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**OFFICE OF ADMINISTRATIVE LAW**

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**DEBRA M. CORNEZ**  
Director

**MEMORANDUM**

TO: Richard Bennion  
FROM: OAL Front Desk  
DATE: 5/15/2014  
RE: Return of Approved Rulemaking Materials  
OAL File No. 2014-0407-01S

OAL hereby returns this file your agency submitted for our review (OAL File No. 2014-0407-01S regarding Taxable Sales of Food Products).

Enclosures If this is an approved file, it contains a copy of the regulation(s) stamped "ENDORSED APPROVED" by the Office of Administrative Law and "ENDORSED FILED" by the Secretary of State. The effective date of an approved regulation is specified on the Form 400 (see item B.5). **Beginning January 1, 2013**, unless an exemption applies, Government Code section 11343.4 states the effective date of an approved regulation is determined by the date the regulation is filed with the Secretary of State (see the date the Form 400 was stamped "ENDORSED FILED" by the Secretary of State) as follows:

- (1) **January 1** if the regulation or order of repeal is filed on September 1 to November 30, inclusive.
- (2) **April 1** if the regulation or order of repeal is filed on December 1 to February 29, inclusive.
- (3) **July 1** if the regulation or order of repeal is filed on March 1 to May 31, inclusive.
- (4) **October 1** if the regulation or order of repeal is filed on June 1 to August 31, inclusive.

If an exemption applies concerning the effective date of the regulation approved in this file, then it will be specified on the Form 400. The Notice of Approval that OAL sends to the state agency will contain the effective date of the regulation. The history note that will appear at the end of the regulation section in the California Code of Regulations will also include the regulation's effective date. Additionally, the effective date of the regulation will be noted on OAL's Web site once OAL posts the Internet Web site link to the full text of the regulation that is received from the state agency. (Gov. Code, secs. 11343 and 11344.)

**Please note this new requirement:** Unless an exemption applies, Government Code section 11343 now requires:

1. **Section 11343(c)(1):** Within 15 days of OAL filing a state agency's regulation with the Secretary of State, the state agency is required to post the regulation on its Internet Web site in an easily marked and identifiable location. The state agency shall keep the regulation posted on its Internet Web site for at least six months from the date the regulation is filed with the Secretary of State.
2. **Section 11343(c)(2):** Within five (5) days of posting its regulation on its Internet Web site, the state agency shall send to OAL the Internet Web site link of each regulation that the agency posts on its Internet Web site pursuant to section 11343(c)(1).

RECEIVED

State of California  
Office of Administrative Law

MAY 16 2014

by EXECUTIVE DIRECTOR'S OFFICE  
STATE BOARD OF EQUALIZATION

In re:  
Board of Equalization

NOTICE OF APPROVAL OF REGULATORY  
ACTION

Regulatory Action:

Government Code Section 11349.3

Title 18, California Code of Regulations

OAL File No. 2014-0407-01 S

Adopt sections:  
Amend sections: 1603  
Repeal sections:

The Board of Equalization proposed this action to amend title 18, California Code of Regulations, section 1603, which pertains to the taxable sales of food products. The proposed amendment will add a definition for "mobile food vendors" and provide that, for sales made on or after July 1, 2014, mobile food vendor sales of taxable items are presumed to be made on a tax included basis, as specified.

OAL approves this regulatory action pursuant to section 11349.3 of the Government Code. This regulatory action becomes effective on 7/1/2014.

Date: 5/15/2014



Richard L. Smith  
Senior Staff Counsel

For: DEBRA M. CORNEZ  
Director

Original: Cynthia Bridges  
Copy: Richard Bennion

## NOTICE PUBLICATION/REGULATORY SUBMISSION

(See instructions on reverse)

For use by Secretary of State only

STD. 300 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER <b>Z-2014-0128-01</b>	REGULATORY ACTION NUMBER <b>2014-0407-015</b>	EMERGENCY NUMBER
For use by Office of Administrative Law (OAL) only			
NOTICE		REGULATIONS	
AGENCY WITH RULEMAKING AUTHORITY State Board of Equalization			

ENDORSED FILED  
IN THE OFFICE OF

2014 MAY 15 PM 2:12

  
 DEBRA BOWEN  
 SECRETARY OF STATE

 2014 APR -7 PM 1:13  
 OFFICE OF  
 ADMINISTRATIVE LAW


## A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)

1. SUBJECT OF NOTICE		TITLE(S)	FIRST SECTION AFFECTED	2. REQUESTED PUBLICATION DATE
3. NOTICE TYPE <input type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON	TELEPHONE NUMBER	FAX NUMBER (Optional)
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn		NOTICE REGISTER NUMBER <b>2014, 62</b>	PUBLICATION DATE <b>2/7/2014</b>

## B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)

1a. SUBJECT OF REGULATION(S) Taxable Sales of Food Products		1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)	
2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)			
SECTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)		ADOPT	
		AMEND	
18		1603	
TITLE(S)		REPEAL	
3. TYPE OF FILING			
<input checked="" type="checkbox"/> Regular Rulemaking (Gov. Code §11346) <input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §§11349.3, 11349.4) <input type="checkbox"/> Emergency (Gov. Code, §11346.1(b)) <input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute. <input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1) <input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h)) <input type="checkbox"/> File & Print <input type="checkbox"/> Other (Specify) _____ <input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100) <input type="checkbox"/> Print Only			
4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)			
5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input checked="" type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a)) <input type="checkbox"/> Effective on filing with Secretary of State <input type="checkbox"/> \$100 Changes Without Regulatory Effect <input type="checkbox"/> Effective other (Specify) _____			
6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY			
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660) <input type="checkbox"/> Fair Political Practices Commission <input type="checkbox"/> State Fire Marshal <input type="checkbox"/> Other (Specify) _____			
7. CONTACT PERSON Richard E. Bennion		TELEPHONE NUMBER (916) 445-2130	FAX NUMBER (Optional) (916) 324-3984
		E-MAIL ADDRESS (Optional) rbennion@boe.ca.gov	

8. I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.

SIGNATURE OF AGENCY HEAD OR DESIGNEE 	DATE April 7, 2014
TYPED NAME AND TITLE OF SIGNATORY Joann Richmond, Chief, Board Proceedings Division	

For use by Office of Administrative Law (OAL) only

ENDORSED APPROVED

MAY 15 2014

Office of Administrative Law



**Final Text of Proposed Amendments to  
California Code of Regulations, Title 18, Section 1603**

**1603. Taxable Sales of Food Products.**

(a) Restaurants, Hotels, Boarding Houses, Soda Fountains, and Similar Establishments.

(1) Definitions.

(A) Boarding House. The term “boarding house” as used in this regulation means any establishment regularly serving meals, on the average to five or more paying guests. The term includes a “guest home,” “residential care home,” “halfway house,” and any other establishment providing room and board or board only, which is not an institution as defined in Regulation 1503 and section 6363.6 of the Revenue and Taxation Code. The fact that guests may be recipients of welfare funds does not affect the application of tax. A person or establishment furnishing meals on the average to fewer than five paying guests during the calendar quarter is not considered to be engaged in the business of selling meals at retail.

(B) American Plan Hotel. The term “American Plan Hotel” as used in this regulation means a hotel which charges guests a fixed sum by the day, week, or other period for room and meals combined.

(C) Complimentary Food and Beverages. As used in this subdivision (a), the term “complimentary food and beverages” means food and beverages (including alcoholic and non-alcoholic beverages) which are provided to transient guests on a complimentary basis and:

1. There is no segregation between the charges for rooms and the charges for the food and beverages on the guests’ bills, and
2. The guests are not given an option to refuse the food and beverages in return for a discounted room rental.

(D) Average Retail Value of Complimentary Food and Beverages. The term “average retail value of complimentary food and beverages” (ARV) as used in this regulation means the total amount of the costs of the complimentary food and beverages for the preceding calendar year marked-up one hundred percent (100%) and divided by the number of rooms rented for that year. Costs of complimentary food and beverages include charges for delivery to the lodging establishment but exclude discounts taken and sales tax reimbursement paid to vendors. The 100% markup factor includes the cost of food preparation labor by hotel employees, the fair rental value of hotel facilities used to prepare or serve the food and beverages, and profit.

(E) Average Daily Rate. The term “average daily rate” (ADR) as used in this regulation means the gross room revenue for the preceding calendar year divided by the number of rooms rented for that year. “Gross room revenue” means and includes the full charge to the hotel customers but excludes separately stated occupancy taxes, revenue from

contract and group rentals which do not qualify for complimentary food and beverages, and revenue from special packages (e.g., New Year's Eve packages which include food and beverages as well as guest room accommodations), unless it can be documented that the retail value of the food and beverages provided as a part of the special package is 10% or less of the total package charge as provided in subdivision (a)(2)(B). "Number of rooms rented for that year" means the total number of times all rooms have been rented on a nightly basis provided the revenue for those rooms is included in the "gross room revenue". For example, if a room is rented out for three consecutive nights by one guest, that room will be counted as rented three times when computing the ADR.

## (2) Application Of Tax.

(A) In General. Tax applies to sales of meals or hot prepared food products (see (e) below) furnished by restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments whether served on or off the premises. In the case of American Plan hotels, special packages offered by hotels, e.g., a New Year's Eve package as described in subdivision (a)(1)(E), and boarding houses, a reasonable segregation must be made between the charges for rooms and the charges for the meals, hot prepared food products, and beverages. Charges by hotels or boarding houses for delivering meals or hot prepared food products to, or serving them in, the rooms of guests are includable in the measure of tax on the sales of the meals or hot prepared food products whether or not the charges are separately stated. (Caterers, see (h) below.) Sales of meals or hot prepared food products by restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments to persons such as event planners, party coordinators, or fundraisers, which buy and sell on their own account, are sales for resale for which a resale certificate may be accepted (see subdivision (h)(3)(C)2.)

Souffle cups, straws, paper napkins, toothpicks and like items that are not of a reusable character which are furnished with meals or hot prepared food products are sold with the meals or hot prepared food products. Sales of such items for such purpose to persons engaged in the business of selling meals or hot prepared food products are, accordingly, sales for resale.

(B) Complimentary Food and Beverages. Lodging establishments which furnish, prepare, or serve complimentary food and beverages to guests in connection with the rental of rooms are consumers and not retailers of such food and beverages when the retail value of the complimentary food and beverages is "incidental" to the room rental service regardless of where within the hotel premises the complimentary food and beverages are served. For complimentary food and beverages to qualify as "incidental" for the current calendar year, the average retail value of the complimentary food and beverages (ARV) furnished for the preceding calendar year must be equal to or less than 10% of the average daily rate (ADR) for that year.

If a hotel provides guests with coupons or similar documents which may be exchanged for complimentary food and beverages in an area of the hotel where food and beverages are sold on a regular basis to the general public (e.g., a restaurant), the hotel will be

considered the consumer and not the retailer of such food and beverages if the coupons or similar documents are non-transferable and the guest is specifically identified by name. If the coupons or similar documents are transferable or the guest is not specifically identified, food and beverages provided will be considered sold to the guest at the fair retail value of similar food and beverages sold to the general public. In the case of coupons redeemed by guests at restaurants not operated by the lodging establishment, the hotel will be considered the consumer of food and beverages provided to the hotel's guests and tax will apply to the charge by the restaurant to the hotel.

Lodging establishments are retailers of food and beverages which do not qualify as "incidental" and tax applies as provided in subdivision (a)(2)(A) above. Amounts paid by guests for food and beverages in excess of a complimentary allowance are gross receipts subject to the tax. Lodging establishments are retailers of otherwise complimentary food and beverages sold to non-guests.

In the case of hotels with concierge floor, club level or similar programs, the formula set forth above shall be applied separately with respect to the complimentary food and beverages furnished to guests who participate in the concierge, club or similar program. That is, the concierge, club or similar program will be deemed to be an independent hotel separate and apart from the hotel in which it is operated. The ADR and the retail value of complimentary food and beverages per occupied room will be computed separately with respect to the guest room accommodations entitled to the privileges and amenities involved in the concierge, club or similar program.

The following example illustrates the steps in determining whether the food and beverages are complimentary:

**FORMULA:**  $ARV \div ADR \leq 10\%$

**Average Daily Rate (ADR):**

Room Revenue	\$9,108,000
Rooms Rented	74,607
ADR (\$9,108,000 ÷ 74,607)	\$122.08

**Average Retail Value of Complimentary Food and Beverages (ARV):**

Complimentary Food Cost	\$169,057
Complimentary Beverage Cost	52,513
Total	\$221,570
Add 100% Markup	221,570
Average Retail Value	\$443,140
ARV per occupied room (\$443,140 ÷ 74,607)	\$5.94

**Application of Formula:**

$$\$5.94 \div \$122.08 = 4.87\%$$

In the above example, the average retail value of the complimentary food and beverages per occupied room for the preceding calendar year is equal to or less than 10% of the average daily rate. Therefore, under the provisions of this subdivision (a)(2)(B), the complimentary food and beverages provided to guests for the current calendar year qualify as “incidental”. The lodging establishment is the consumer and not the retailer of such food and beverages. This computation must be made annually.

When a lodging establishment consists of more than one location, the operations of each location will be considered separately in determining if that location’s complimentary food and beverages qualify as incidental.

(C) “Free” Meals. When a restaurant agrees to furnish a “free” meal to a customer who purchases another meal and presents a coupon or card, which the customer previously had purchased directly from the restaurant or through a sales promotional agency having a contract with the restaurant to redeem the coupons or cards, the restaurant is regarded as selling two meals for the price of one, plus any additional compensation from the agency or from its own sales of coupons. Any such additional compensation is a part of its taxable gross receipts for the period in which the meals are served.

Tax applies only to the price of the paid meal plus any such additional compensation.

(b) “Drive-Ins.” Tax applies to sales of food products ordinarily sold for immediate consumption on or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the “drive-in” establishment, even though such products are sold on a “take out” or “to go” order and are actually packaged or wrapped and taken from the premises of the retailer. Food products when sold in bulk, i.e., in quantities or in a form not suitable for consumption on the retailer’s premises, are not regarded as ordinarily sold for immediate consumption on or near the location at which parking facilities are provided by the retailer. Accordingly, with the exception of sales of hot prepared food products (see (e) below) and sales of cold food under the 80-80 rule (see (c) below), sales of ice cream, doughnuts, and other individual food items in quantities obviously not intended for consumption on the retailer’s premises, without eating utensils, trays, or dishes and not consumed on the retailer’s premises, are exempt from tax. Any retailer claiming a deduction on account of food sales of this type must support the deduction by complete and detailed records.<sup>1</sup>

(c) Cold Food Sold on a “Take-Out” Order.

(1) General.

(A) Seller Meeting Criteria of 80-80 Rule. When a seller meets both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax applies to sales of cold food products (including sales for a separate price of hot bakery goods and hot beverages such as coffee) in a form suitable for consumption on the seller’s premises even though such food

products are sold on a “take-out” or “to go” order. Sales of cold food products which are suitable for consumption on the seller’s premises are subject to the tax no matter how great the quantity purchased, e.g., 40 one-half pint containers of milk. Except as provided elsewhere in this regulation, tax does not apply to sales of food products which are furnished in a form not suitable for consumption on the seller’s premises.

Operative April 1, 1996, although a seller may meet both criteria of the 80-80 rule, he or she may elect to separately account for the sale of “take-out” or “to go” orders of cold food products which are in a form suitable for consumption on the seller’s premises. The gross receipts from the sale of those food products shall be exempt from the tax provided the seller keeps a separate accounting of these transactions in his or her records. Tax will remain applicable to the sale of food products as provided in subdivisions (a), (b), (e), or (f) of this regulation. Failure to maintain the required separate accounting and documentation claimed as exempt under this subdivision will revoke the seller’s election under this subdivision.

(B) Seller Not Meeting Criteria of 80-80 Rule. When a seller does not meet both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax does not apply to sales of cold food products (including sales for a separate price of hot bakery goods and hot beverages such as coffee) when sold on a “take-out” or “to go” order.

## (2) Definitions.

(A) For purposes of this subdivision (c), the term “suitable for consumption on the seller’s premises” means food products furnished:

1. In a form which requires no further processing by the purchaser, including but not limited to cooking, heating, thawing, or slicing, and
2. In a size which ordinarily may be immediately consumed by one person such as a large milk shake, a pint of ice cream, a pint of milk, or a slice of pie. Cold food products (excluding milk shakes and similar milk products) furnished in containers larger in size than a pint are considered to be in a form not suitable for immediate consumption.

Pieces of candy sold in bulk quantities of one pound or greater are deemed to be sold in a form not suitable for consumption on the seller’s premises.

The term does not include cold food products which obviously would not be consumed on the premises of the seller, e.g., a cold party tray or a whole cold chicken.

(B) For purposes of this subdivision (c), the term “seller’s premises” means the individual location at which a sale takes place rather than the aggregate of all locations of the seller. For example, if a seller operates several drive-in and fast food restaurants, the operations of each location stand alone and are considered separately in determining if the sales of food products at each location meet the criteria of the 80-80 rule.

When two or more food-selling activities are conducted by the same person at the same location, the operations of all food related activities will be considered in determining if the sales of food products meet the criteria of the 80-80 rule. For example, if a seller operates a grocery store and a restaurant with no physical separation other than separate cash registers, the grocery store operations will be included in determining if the sales of food products meet the criteria of the 80-80 rule. When there is a physical separation where customers of one operation may not pass freely into the other operation, e.g., separate rooms with separate entrances but a common kitchen, each operation will be considered separately for purposes of this subdivision (c).

(3) 80-80 Rule. Tax applies under this subdivision (c) only if the seller meets both of the following criteria:

(A) More than 80 percent of the seller's gross receipts are from the sale of food products, and

(B) More than 80 percent of the seller's retail sales of food products are taxable as provided in subdivisions (a), (b), (e), and (f) of this regulation.

Sales of alcoholic beverages, carbonated beverages, or cold food to go not suitable for immediate consumption should not be included in this computation. Any seller meeting both of these criteria and claiming a deduction for the sale of cold food products in a form not suitable for consumption on the seller's premises must support the deduction by complete and detailed records of such sales made.

(d) Places Where Admission Is Charged.

(1) General. Tax applies to sales of food products when sold within, and for consumption within, a place the entrance to which is subject to an admission charge, during the period when the sales are made, except for national and state parks and monuments, and marinas, campgrounds, and recreational vehicle parks.

(2) Definitions.

(A) "Place" means an area the exterior boundaries of which are defined by walls, fences or otherwise in such a manner that the area readily can be recognized and distinguished from adjoining or surrounding property. Examples include buildings, fenced enclosures and areas delimited by posted signs.

(B) "Within a place" means inside the door, gate, turnstile, or other point at which the customer must pay an admission charge or present evidence, such as a ticket, that an admission charge has been paid. Adjacent to, or in close proximity to, a place is not within a place.

(C) “Admission charge” means any consideration required to be paid in money or otherwise, for admittance to a place.

“Admission charge” does not include:

1. Membership dues in a club or other organization entitling the member to, among other things, entrance to a place maintained by the club or organization, such as a fenced area containing a club house, tennis courts, and a swimming pool. Where a guest is admitted to such a place only when accompanied by or vouched for by a member of the club or organization, any charge made to the guest for use of facilities in the place is not an admission charge.
2. A charge for a student body card entitling the student to, among other things, entrance to a place, such as entrance to a school auditorium at which a dance is held.
3. A charge for the use of facilities within a place to which no entrance charge is made to spectators. For example, green fees paid for the privilege of playing a golf course, a charge made to swimmers for the use of a pool within a place, or a charge made for the use of lanes in a public bowling place.

(D) “National and state parks and monuments” means those which are part of the National Park System or the State Park System. The phrase does not include parks and monuments not within either of those systems, such as city, county, regional, district or private parks.

(3) Presumption That Food Is Sold for Consumption Within a Place.

When food products are sold within a place the entrance to which is subject to an admission charge, it will be presumed, in the absence of evidence to the contrary, that the food products are sold for consumption within the place. Obtaining and retaining evidence in support of the claimed tax exemption is the responsibility of the retailer. Such evidence may consist, for example, of proof that the sales were of canned jams, cake mixes, spices, cooking chocolate, or other items in a form in which it is unlikely that such items would be consumed within the place where sold.

(4) Food Sold to Students. The exemption otherwise granted by Section 6363 does not apply to sales of food products to students when sold within, and for consumption within, a place the entrance to which is subject to an admission charge, and such sales are subject to tax except as provided in (p) of this regulation. For example, when food products are sold by a student organization to students or to both students and nonstudents within a place the entrance to which is subject to an admission charge, such as a place where school athletic events are held, the sales to both students and nonstudents are taxable.

(e) Hot Prepared Food Products.

(1) General. Tax applies to all sales of hot prepared food products unless otherwise exempt. "Hot prepared food products" means those products, items, or components which have been prepared for sale in a heated condition and which are sold at any temperature which is higher than the air temperature of the room or place where they are sold. The mere heating of a food product constitutes preparation of a hot prepared food product, e.g., grilling a sandwich, dipping a sandwich bun in hot gravy, using infra-red lights, steam tables, etc.. If the sale is intended to be of a hot food product, such sale is of a hot food product regardless of cooling which incidentally occurs. For example, the sale of a toasted sandwich intended to be in a heated condition when sold, such as a fried ham sandwich on toast, is a sale of a hot prepared food product even though it may have cooled due to delay. On the other hand, the sale of a toasted sandwich which is not intended to be in a heated condition when sold, such as a cold tuna sandwich on toast, is not a sale of a hot prepared food product.

When a single price has been established for a combination of hot and cold food items, such as a meal or dinner which includes cold components or side items, tax applies to the entire established price regardless of itemization on the sales check. The inclusion of any hot food product in an otherwise cold combination of food products sold for a single established price, results in the tax applying to the entire established price, e.g., hot coffee served with a meal consisting of cold food products, when the coffee is included in the established price of the meal. If a single price for the combination of hot and cold food items is listed on a menu, wall sign or is otherwise advertised, a single price has been established. Except as otherwise provided in (b), (c), (d) or (f) of this regulation, or in Regulation 1574, tax does not apply to the sale for a separate price of bakery goods, beverages classed as food products, or cold or frozen food products. Hot bakery goods and hot beverages such as coffee are hot prepared food products but their sale for a separate price is exempt unless taxable as provided in (b), (c), (d) or (f) of this regulation, or in Regulation 1574. Tax does apply if a hot beverage and a bakery product or cold food product are sold as a combination for a single price. Hot soup, bouillon, or consomme is a hot prepared food product, which is not a beverage.

(2) Air Carriers Engaged in Interstate or Foreign Commerce. Tax does not apply to the sale, storage, use, or other consumption of hot prepared food products sold by caterers or other vendors to air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers, nor to the sale, storage, use, or other consumption of hot prepared food products sold or served to passengers by air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers. "Air carriers" are persons or firms in the business of transporting persons or property for hire or compensation, and include both common and contract carriers. "Passengers" do not include crew members. Any caterer or other vendor claiming the exemption must support it with an exemption certificate from the air carrier substantially in the form prescribed in Appendix A of this regulation.

(f) Food for Consumption at Facilities Provided by the Retailer. Tax applies to sales of sandwiches, ice cream, and other foods sold in a form for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others.



A passenger's seat aboard a train, or a spectator's seat at a game, show, or similar event is not a "chair" within the meaning of this regulation. Accordingly, except as otherwise provided in (c), (d), and (e) above, tax does not apply to the sale of cold sandwiches, ice cream, or other food products sold by vendors passing among the passengers or spectators where the food products are not "for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer."

(g) Tips, Gratuities, and Service Charges.

This subdivision applies to restaurants, hotels, caterers, boarding houses, soda fountains, drive-ins and similar establishments.

An optional payment designated as a tip, gratuity, or service charge is not subject to tax. A mandatory payment designated as a tip, gratuity, or service charge is included in taxable gross receipts, even if the amount is subsequently paid by the retailer to employees.

(1) Optional Payment.

(A) A payment of a tip, gratuity, or service charge is optional if the customer adds the amount to the bill presented by the retailer, or otherwise leaves a separate amount in payment over and above the actual amount due the retailer for the sale of meals, food, and drinks that include services. The following examples illustrate transactions where a payment of a tip, gratuity or service charge is optional and not included in taxable gross receipts. This is true regardless of printed statements on menus, brochures, advertisements or other materials notifying customers that tips, gratuities, or service charges will or may be added by the retailer to the prices of meals, food, or drinks:

Example 1. The restaurant check is presented to the customer with the "tip" area blank so the customer may voluntarily write in an amount, or

Example 2. The restaurant check is presented to the customer with options computed by the retailer and presented to the customer as tip suggestions. The "tip" area is blank so the customer may voluntarily write in an amount:

Guest Check	
Food Item A	\$9.95
Beverage Item B	3.75
Subtotal	\$13.70
8% sales tax	1.10
Subtotal	\$14.80
Tip*	
Total	
*Suggested tips:	
15%=\$2.06; 18%=\$2.47; 20%=\$2.74; other.	

If an employer misappropriates these payments for these charges, as discussed in subdivision (g)(1)(B) below, such payments are included in the retailer's taxable gross receipts.

(B) No employer shall collect, take, or receive any gratuity or a part thereof, paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of such gratuity, or require an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer. (Labor Code section 351.) If this prohibition is violated, any amount of such gratuities received by the employer will be considered a part of the gross receipts of the employer and subject to the tax.

(2) Mandatory Payment.

(A) An amount negotiated between the retailer and the customer in advance of a meal, food, or drinks, or an event that includes a meal, food, or drinks is mandatory.

(B) When the menu, brochures, advertisements or other printed materials contain statements that notify customers that tips, gratuities, or service charges will or may be added, an amount automatically added by the retailer to the bill or invoice presented to and paid by the customer is a mandatory charge and subject to tax. These amounts are considered negotiated in advance as specified in subdivision (g)(2)(A). Examples of printed statements include:

“An 18% gratuity [or service charge] will be added to parties of 8 or more.”

“Suggested gratuity 15%,” itemized on the invoice or bill by the restaurant, hotel, caterer, boarding house, soda fountain, drive-in or similar establishment.

“A 15% voluntary gratuity will be added for parties of 8 or more.”

An amount will be considered “automatically added” when the retailer adds the tip to the bill without first conferring with the customer after service of the meal and receiving approval to add the tip or without providing the customer with the option to write in the tip. Nonetheless, any amount added by the retailer is presumed to be mandatory. This presumption may be overcome as discussed in subdivision (g)(2)(C) below.

(C) It is presumed that an amount added as a tip by the retailer to the bill or invoice presented to the customer is mandatory. A statement on the bill or invoice that the amount added by the retailer is a “suggested tip,” “optional gratuity,” or that “the amount may be increased, decreased, or removed” by the customer does not change the mandatory nature of the charge.

This presumption may be controverted by documentary evidence showing that the customer specifically requested and authorized the gratuity be added to the amount billed.

Examples of documentary evidence that may be used to overcome the presumption include:

1. A guest check that is presented to the customer showing sales tax reimbursement and the amount upon which it was computed, without tip or with the “tip” area blank and a separate document, such as a credit card receipt, to which the retailer adds or prints the requested tip.
2. Guests receipts and payments showing that the percentage of tips paid by large groups varies from the percentage stated on the menu, brochure, advertisement or other printed materials.
3. A retailer’s written policy stating that its employees shall receive confirmation from a customer before adding a tip together with additional verifiable evidence that the policy has been enforced. The policy is not in itself sufficient documentation to establish that the customer requested and authorized that a gratuity be added to the amount billed without such additional verifiable evidence.

The retailer must retain the guest checks and any additional separate documents to show that the payment is optional. The retailer is also required to maintain other records in accordance with the requirements of Regulation 1698, Records.

(h) Caterers.

(1) Definition. The term “caterer” as used in this regulation means a person engaged in the business of serving meals, food, or drinks on the premises of the customer, or on premises supplied by the customer, including premises leased by the customer from a person other than the caterer, but does not include employees hired by the customer by the hour or day.

(2) Sales to Caterers. A caterer generally is considered to be the consumer of tangible personal property normally used in the furnishing and serving of meals, food or drinks, except for separately stated charges by the caterer for the lease of tangible personal property or tangible personal property regarded as being sold with meals, food or drinks such as disposable plates, napkins, utensils, glasses, cups, stemware, place mats, trays, covers and toothpicks.

(3) Sales by Caterers.

(A) Caterer as Retailer. Tax applies to the entire charge made by caterers for serving meals, food, and drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals, whether performed by the caterer, the caterer’s employees or subcontractors. Tax applies to charges made by caterers for preparing and serving meals and drinks even though the food is not provided by the caterers. Tax applies to charges made by caterers for hot prepared food products as in (e) above whether or not served by the caterers. A caterer who separately states or itemizes charges for the lease of tangible

personal property regardless of the use of the property will be deemed to be the lessor of such property. Tax applies in accordance with Regulation 1660 Leases of Tangible Personal Property - In General. Tax does not apply to charges made by caterers for the rental of dishes, silverware, glasses, etc., purchased by the caterer with tax paid on the purchase price if no food is provided or served by the caterers in connection with such rental.

(B) Caterers as Lessors of Property Unrelated to the Serving or Furnishing of Meals, Food, or Drinks by a Caterer.

1. When a caterer who is furnishing or serving meals, food, or drinks also rents or leases from a third party tangible personal property which the caterer does not use himself or herself and the property is not customarily provided or used within the catering industry in connection with the furnishing and serving of food or drinks, such as decorative props related solely to optional entertainment, special lighting for guest speakers, sound or video systems, dance floors, stages, etc., he or she is a lessor of such property. In such instance, tax applies to the lease in accordance with Regulation 1660.
2. When a person who in other instances is a caterer does not furnish or serve any meals, food, or drinks to a customer, but rents or leases from a third party tangible personal property such as dishes, linen, silverware and glasses, etc., for purposes of providing it to his or her customer, he or she is not acting as a caterer within the meaning of this regulation, but solely as a lessor of tangible personal property. In such instances tax applies to the lease in accordance with Regulation 1660.

(C) Caterers Planning, Designing and Coordinating Events.

1. Tax applies to charges by a caterer for event planning, design, coordination, and/or supervision if they are made in connection with the furnishing of meals, food, or drinks for the event. Tax does not apply to separately stated charges for services unrelated to the furnishing and serving of meals, food, or drinks, such as optional entertainment or any staff who do not directly participate in the preparation, furnishing, or serving of meals, food, or drinks, e.g., coat-check clerks, parking attendants, security guards, etc.
2. When a caterer sells meals, food, or drinks, and the serving of them, to other persons such as event planners, party coordinators, or fundraisers, who buy and sell the same on their own account or for their own sake, it is a sale for resale for which the caterer may accept a resale certificate. However, a caterer may only claim the sale as a resale if the caterer obtains a resale certificate in compliance with Regulation 1668. A person is buying or selling for his or her own account, or own sake, when such person has his or her own contract with a customer to sell the meals, food, or drinks to the customer, and is not merely acting on behalf of the caterer.

3. When a caterer sells meals, food or drinks and the serving of them to other persons who charge a fee for their service unrelated to the taxable sale, the separately stated fee is not subject to tax.

(D) Sales of Meals by Caterers to Social Clubs, Fraternal Organizations. Sales of meals to social clubs and fraternal organizations, as those terms are defined in subdivision (i) below, by caterers are sales for resale if such social clubs and fraternal organizations are the retailers of the meals subject to tax under subdivision (i) and give valid resale certificates therefor.

(E) Tips, Gratuities, or Service Charges. Tips, gratuities, and service charges are discussed in subdivision (g).

(4) Premises. General. Separately stated charges for the lease of premises on which meals, food, or drinks are served, are nontaxable leases of real property. Where a charge for leased premises is a guarantee against a minimum purchase of meals, food or drinks, the charge for the guarantee is gross receipts subject to tax. Where a person contracts to provide both premises and meals, food or drinks, the charge for the meals, food or drinks must be reasonable in order for the charge for the premises to be non taxable.

(5) Private Chefs. A private chef is generally not an employee of the customer, but an independent contractor who pays his or her own social security, and federal and state income taxes. Such a private chef, who prepares and serves meals, food and drinks in the home of his or her customer is a caterer under this regulation.

(i) Social Clubs and Fraternal Organizations. "Social Clubs and Fraternal Organizations" as used herein include any corporation, partnership, association or group or combination acting as a unit, such as service clubs, lodges, and community, country, and athletic clubs.

The tax applies to receipts from the furnishing of meals, food, and drink by social clubs and fraternal organizations unless furnished: (1) exclusively to members; and also, (2) less frequently than once a week. Both these requirements must be met. If the club or organization furnishes meals, food or drink to nonmembers, all receipts from the furnishing of meals, food or drink are subject to tax whether furnished to members or nonmembers, including receipts on occasions when furnished exclusively to members. Meals, food or drink paid for by members are considered furnished to them even though consumed by guests who are not members.

(j) Student Meals.

(1) Definitions.

(A) "Food Products". As used herein, the term "food products" as defined in Regulation 1602 (18 CCR 1602) includes food furnished, prepared, or served for consumption at tables, chairs, or counters, or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare or serve food to others.

(B) “Meals”. As used herein, the term “meals” includes both food and nonfood products which are sold to students for an established single price at a time set aside for meals. If a single price for the combination of a nonfood product and a food product is listed on a menu or on a sign, a single price has been established. The term “meals” does not include nonfood products which are sold to students for a separate price and tax applies to the sales of such products. Examples of nonfood products are: carbonated beverages and beer. For the purpose of this regulation, products sold at a time designated as a “nutrition break”, “recess”, or similar break, will not be considered “meals”.

## (2) Application of Tax.

(A) Sales by Schools, School Districts and Student Organizations. Sales of meals or food products for human consumption to students of a school by public or private schools, school districts, and student organizations are exempt from tax, except as otherwise provided in (d)(4) above.

(B) Sales by Parent-Teacher Associations. Tax does not apply to the sale of, nor the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served to the students of a school by parent-teacher associations. Parent-teacher associations qualifying under Regulation 1597 as consumers are not retailers of tangible personal property, which they sell. Accordingly, tax does apply to the sale to such associations of nonfood items such as carbonated beverages, containers, straws and napkins.

(C) Sales by Blind Vendors. Tax does not apply to the sale of meals or food products for human consumption to students of a school by any blind person (as defined in section 19153 of the Welfare and Institutions Code) operating a restaurant or vending stand in an educational institution under article 5 of chapter 6 of part 2 of division 10 of the Welfare and Institutions Code, except as otherwise provided in (d)(4) above.

(D) Sales by Caterers. The application of tax to sales by caterers in general is explained in subdivision (h) above. However, tax does not apply to the sale by caterers of meals or food products for human consumption to students of a school, if all the following criteria are met:

1. The premises used by the caterer to serve the lunches to the students are used by the school for other purposes, such as sporting events and other school activities, during the remainder of the day;
2. The fixtures and equipment used by the caterer are owned and maintained by the school; and
3. The students purchasing the meals cannot distinguish the caterer from the employees of the school.

(k) Employees' Meals.

(1) In General. Any employer or employee organization that is in the business of selling meals, e.g., a restaurant, hotel, club, or association, must include its receipts from the sales of meals to employees, along with its receipts from sales to other purchasers of meals, in the amount upon which it computes its sales tax liability. An employer or an employee organization selling meals only to employees becomes a retailer of meals and liable for sales tax upon its receipts from sales of meals if it sells meals to an average number of five or more employees during the calendar quarter.

(2) Specific Charge. The tax applies only if a specific charge is made to employees for the meals. Tax does not apply to cash paid an employee in lieu of meals. A specific charge is made for meals if:

(A) Employee pays cash for meals consumed.

(B) Value of meals is deducted from employee's wages.

(C) Employee receives meals in lieu of cash to bring compensation up to legal minimum wage.

(D) Employee has the option to receive cash for meals not consumed.

(3) No Specific Charge. If an employer makes no specific charge for meals consumed by employees, the employer is the consumer of the food products and the non-food products, which are furnished to the employees as a part of the meals.

In the absence of any of the conditions under (k) (2) a specific charge is not made if:

(A) A value is assigned to meals as a means of reporting the fair market value of employees' meals pursuant to state and federal laws or regulations or union contracts.

(B) Employees who do not consume available meals have no recourse on their employer for additional cash wages.

(C) Meals are generally available to employees, but the duties of certain employees exclude them from receiving the meals and are paid cash in lieu thereof.

(4) Meals Credited Toward Minimum Wage. If an employee receives meals in lieu of cash to bring his or her compensation up to the legal minimum wage, the amount by which the minimum wage exceeds the amount otherwise paid to the employee is includable in the employer's taxable gross receipts up to the value of the meals credited toward the minimum wage.

For example, if the minimum rate for an eight-hour day is \$46.00, and the employee received \$43.90 in cash, and a lunch is received which is credited toward the minimum wage in the

maximum allowable amount of \$2.10, the employer has received gross receipts in the amount of \$2.10 for the lunch.

(5) Tax Reimbursement. If a separately stated amount for tax reimbursement is not added to the price of meals sold to employees for which a specific charge is made, the specific charge will be regarded as being a tax-included charge for the meals.

(l) Religious Organizations. Tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served by any religious organization at a social or other gathering conducted by it or under its auspices, if the purpose in furnishing or serving the meals and food products is to obtain revenue for the functions and activities of the organization and the revenue obtained from furnishing or serving the meals and food products is actually used in carrying on such functions and activities. For the purposes of this regulation, “religious organization” means any organization the property of which is exempt from taxation pursuant to subdivision (f) of section 3 of article XIII of the State Constitution.

(m) Institutions. Tax does not apply to the sale of, nor the storage, use, or other consumption in this state of, meals and food products for human consumption furnished or served to and consumed by patients or residents of an “institution” as defined in Regulation 1503. Tax, however, does apply to the sale of meals and food products by an institution to persons other than patients or residents of the institution.

(n) Meal Programs for Low-Income Elderly Persons. Tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served to low-income elderly persons at or below cost by a nonprofit organization or governmental agency under a program funded by this state or the United States for such purposes.

(o) Food Products, Nonalcoholic Beverages and Other Tangible Personal Property Transferred by Nonprofit Youth Organizations. See Regulation 1597 for application of tax on food products, nonalcoholic beverages and other tangible personal property transferred by nonprofit youth organizations.

(p) Nonprofit Parent-Teacher Associations. Nonprofit parent-teacher associations and equivalent organizations qualifying under Regulation 1597 are consumers and not retailers of tangible personal property, which they sell.

(q) Meals and Food Products Served to Condominium Residents. Tax does not apply to the sale of and the storage, use, or other consumption in this state of meals and food products for human consumption furnished to and consumed by persons 62 years of age or older residing in a condominium and who own equal shares in a common kitchen facility; provided, that the meals and food products are served to such persons on a regular basis.



This exemption is applicable only to sales of meals and food products for human consumption prepared and served at the common kitchen facility of the condominium. Tax applies to sales to persons less than 62 years of age.

(r) Veteran's Organization. Beginning April 1, 2004, tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served by any nonprofit veteran's organization at a social or other gathering conducted by it or under its auspices, if the purpose in furnishing or serving the meals and food products is to obtain revenue for the functions and activities of the organization and the revenue obtained from furnishing or serving the meals and food products is actually used in carrying on those functions and activities.

(s) Food Stamp Coupons. Tax does not apply to tangible personal property which is eligible to be purchased with federal food stamp coupons acquired pursuant to the Food Stamp Act of 1977 and so purchased. When payment is made in the form of both food stamps and cash, the amount of the food stamp coupons must be applied first to tangible personal property normally subject to the tax, e.g., nonalcoholic carbonated beverages. Retailers are prohibited from adding any amount designated as sales tax, use tax, or sales tax reimbursement to sales of tangible personal property purchased with food stamp coupons. (See paragraph (c) of Regulation 1602.5 for special reporting provisions by grocers.)

(t) Honor System Snack Sales. An "honor system snack sale" means a system where customers take snacks from a box or tray and pay by depositing money in a container provided by the seller. Snacks sold through such a system may be subject to tax depending upon where the sale takes place. Sales of such snacks are taxable when sold at or near a lunchroom, break room, or other facility that provides tables and chairs, and it is contemplated that the food sold will normally be consumed at such facilities. Honor system snack sales do not include hotel room mini-bars or snack baskets.

(u) Mobile Food Vendors. Mobile food vendors include retailers who sell food and beverages for immediate consumption from motorized vehicles or un-motorized carts. Examples of mobile food vendors include food trucks, coffee carts, and hot dog carts. For sales made on or after July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors' sales of taxable items are presumed to be made on a tax-included basis.

This presumption does not apply when a mobile food vendor is making sales as a "caterer" as defined in (h)(1).

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1 The records acceptable in support of such a deduction are:

(a) A sales ticket prepared for each transaction claimed as being tax exempt showing:

(1) Date of the sale,

- (2) The kind of merchandise sold,
  - (3) The quantity of each kind of merchandise sold,
  - (4) The price of each kind of merchandise sold,
  - (5) The total price of merchandise sold,
  - (6) A statement to the effect that the merchandise purchased is not to be consumed on or near the location at which parking facilities are provided by the retailer, and
- (b) A daily sales record kept in sufficient detail to permit verification by audit that all gross receipts from sales have been accounted for and that all sales claimed as being tax exempt are included therein.

## **Appendix A**

### **California Sales Tax Exemption Certificate Supporting Exemption Under Section 6359.1**

The undersigned certifies that it is an air carrier engaged in interstate or foreign commerce and that the hot prepared food products purchased from \_\_\_\_\_ will be consumed by passengers on its flights.

The undersigned further certifies that it understands and agrees that if the property purchased under this certificate is used by the purchaser for any purpose other than that specified above, the purchaser shall be liable for sales tax as if it were a retailer making a retail sale of the property at the time of such use, and the sales price of the property to it shall be deemed the gross receipts from such sale.

Date Certificate Given \_\_\_\_\_  
Purchasing Air Carrier \_\_\_\_\_  
(company name)

Address \_\_\_\_\_  
Signed By \_\_\_\_\_  
(signature of authorized person)

\_\_\_\_\_  
(print or type name)  
Title \_\_\_\_\_  
(owner, partner, purchasing agent, etc.)

Seller's Permit No. (if any) \_\_\_\_\_

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6006, 6012, 6359, 6359.1, 6359.45, 6361, 6363, 6363.5, 6363.6, 6363.8, 6370, 6373, 6374 and 6376.5, Revenue and Taxation Code.

Food Products Generally, see Regulation 1602.

Alcoholic Beverages, tax reimbursements when served with, see Regulation 1700.

“Free” meals with purchased meals, see Regulation 1670.

Meals served to patients and inmates of an institution, see Regulation 1503.

Vending Machines, when considered selling meals, see Regulation 1574.

Meals at summer camps, see Regulation 1506(e).

Parent-Teacher associations as consumers, see Regulation 1597.

# Memorandum

To : Richard Smith  
Office of Administrative Law  
300 Capitol Mall, Suite 1250  
Sacramento, CA 95814

2014 MAY 15 AM 9:03

Date: May 15, 2014

OFFICE OF  
ADMINISTRATIVE LAW

From : Richard Bennion  
Regulations Coordinator  
Board Proceedings Division, MIC: 80

Subject : *OAL File No. 2014-0407-01S*  
*Regulations 1603, Taxable Sales of Food Products*

The Office of Administrative Law (OAL) is authorized to make the following substitutions and corrections in connection with the above-referenced rulemaking file:

1. Behind tab 5, replace page four of the 399 form with the attached document, which is a copy of the original page four, but is reduced in size to show the marked box number 5 that was covered by the three hole punched.
2. Please replace the final text attached to the Form 400s with the final text I have hand delivered to your office.

If you have any questions or comments, please notify me at (916) 445-2130 or email at [Richard.Bennion@boe.ca.gov](mailto:Richard.Bennion@boe.ca.gov).

REB

# SUMMARY OF REGULATORY ACTIONS

## REGULATIONS FILED WITH SECRETARY OF STATE

This Summary of Regulatory Actions lists regulations filed with the Secretary of State on the dates indicated. Copies of the regulations may be obtained by contacting the agency or from the Secretary of State, Archives, 1020 O Street, Sacramento, CA 95814, (916) 653-7715. Please have the agency name and the date filed (see below) when making a request.

File# 2014-0407-01

BOARD OF EQUALIZATION

Taxable Sales of Food Products

The Board of Equalization amended title 18, California Code of Regulations, section 1603, which pertains to the taxable sales of food products. The amendment adds a definition for "mobile food vendors" and provides that, for sales made on or after July 1, 2014, mobile food vendor sales of taxable items are presumed to be made on a tax-included basis, as specified.

Title 18

California Code of Regulations

AMEND: 1603

Filed 05/15/2014

Effective 07/01/2014

Agency Contact:

Richard E. Bennion (916) 445-2130

File# 2014-0425-02

BUREAU OF AUTOMOTIVE REPAIR

Smog Check Inspector and Repair Technician Application

This action without regulatory effect amends the Smog Check Inspector and Repair Technician Application.

Title 16

California Code of Regulations

AMEND: 3340.29

Filed 05/21/2014

Agency Contact: Vincent Somma (916) 403-8560

File# 2014-0512-01

CALIFORNIA HEALTH BENEFIT EXCHANGE

2015 Standard Benefit Design

The California Patient Protection and Affordable Care Act established the California Health Benefit Exchange (HBEX). HBEX is responsible for arranging and contracting with health insurance issuers to provide

affordable, quality health insurance coverage to qualified individuals and qualified employers through the Exchange. In this emergency rulemaking action, HBEX adopts the 2015 Standard Benefit Plan Designs, which standardize the way health plans are designed. The 2015 Standard Benefit Plan Designs are incorporated by reference in section 6460 of title 10 of the California Code of Regulations.

Title 10

California Code of Regulations

ADOPT: 6460

Filed 05/21/2014

Effective 05/21/2014

Agency Contact: Brandon Ross (916) 228-8281

File# 2014-0506-01

CALIFORNIA HEALTH FACILITIES FINANCING AUTHORITY

Investment in Mental Health Wellness Grant Program

The California Health Facilities Financing Authority submitted this emergency readopt action to maintain the regulation adopted in OAL File No. 2013-1114-02E, which added sections 7113 through 7129 to Title 10 of the California Code of Regulations. That emergency rulemaking implemented SB 82 and SB 101, which provide additional funding to counties to improve access and capacity for crisis services for Californians affected by mental health disorders.

Title 4

California Code of Regulations

ADOPT: 7113, 7114, 7115, 7116, 7117, 7118, 7119, 7120, 7121, 7122, 7123, 7124, 7125, 7126, 7127, 7128, 7129

Filed 05/15/2014

Effective 05/15/2014

Agency Contact: Rosalind Brewer (916) 653-8243

File# 2014-0409-02

CALIFORNIA HEALTH FACILITIES FINANCING AUTHORITY

Amendments to Children's Hospital Program of 2004 Regulations

The California Health Facilities Financing Authority (Authority) amended nine sections under title 4 of the California Code of Regulations pertaining to the implementation of the Children's Hospital Bond Act of 2004 and which provides grant funding to the Children's Hospital Program through sales of general obligation bonds. Pursuant to these regulations, the first round of funding is set to expire on 6/30/2014, and a second round of funding is to commence on 7/1/2014 with applications for funding to be available by 6/1/2014. The purpose of this action is to provide for the second funding round starting 7/1/2014 and expiring 6/30/2018,

Rulemaking File Index  
Title 18. Public Revenue  
Sales and Use Tax

Regulation 1603, *Taxable Sales of Food Products*

1. [Final Statement of Reasons](#)
2. [Updated Informative Digest](#)
3. [Business Tax Committee Minutes, November 19, 2013](#)
  - Minutes
  - Deputy Director memo dated November 15, 2013
  - BTC Agenda
  - Formail Issue Paper Number 13-009
  - Exhibit 1 Revenue Estimate
  - Exhibit 2 Text Regulation 1603
4. [Reporter's Transcript Business Taxes Committee, November 19, 2013](#)
5. [Estimate of Cost or Savings, January 24, 2014](#)
6. [Economic and Fiscal Impact Statements, January 28, 2014](#)
7. [Notice of Publications](#)
  - Form 400 and Notice, Publication Date February 7, 2014
  - Email sent to Interested Parties, February 7, 2014
  - CA Regulatory Notice Register 2014, Volume No. 6-Z
8. [Notice to Interested Parties, February 7, 2014](#)

The following items are exhibited:

  - Notice of Hearing
  - Initial Statement of Reasons
  - Proposed Text of Regulation 1603
  - Regulation History
9. [Statement of Compliance](#)
10. [Reporter's Transcript, Item F1, March 25, 2014](#)
11. [Draft Minutes, March 25, 2014, and Exhibits](#)
  - Notice of Proposed Regulatory Action
  - Initial Statement of Reasons
  - Proposed Text of Regulation 1603
  - Regulation History

**Final Statement of Reasons for the Adoption of the  
Proposed Amendments to California Code of Regulations,  
Title 18, Section 1603, *Taxable Sales of Food Products***

Update of Information in the Initial Statement of Reasons

The State Board of Equalization (Board) held a public hearing regarding the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1603, *Taxable Sales of Food Products*, on March 25, 2014. During the public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 1603 without making any changes. The Board did not receive any written comments regarding the proposed regulatory action and no interested parties appeared at the public hearing on March 25, 2014, to comment on the proposed regulatory action.

The factual basis, specific purpose, and necessity for, the problem to be addressed by, and the anticipated benefits from the adoption of the proposed amendments to Regulation 1603 are the same as provided in the initial statement of reasons. The Board anticipates that the proposed amendments to Regulation 1603 will promote fairness and benefit taxpayers, Board staff, and the Board by providing regulatory provisions consistent with industry practice and the understanding of mobile food vendors and their customers that mobile food vendors' sales are made on a tax-included basis.

The adoption of the proposed amendments to Regulation 1603 is not mandated by federal law or regulations. There is no previously adopted or amended federal regulation that is identical to Regulation 1603 or the proposed amendments to Regulation 1603.

The Board did not rely on any data or any technical, theoretical, or empirical study, report, or similar document in proposing or adopting the proposed amendments to Regulation 1603 that was not identified in the initial statement of reasons, or which was otherwise not identified or made available for public review prior to the close of the public comment period.

In addition, the factual basis has not changed for the Board's initial determination that the proposed regulatory action will not have a significant adverse economic impact on business, the Board's determination that the proposed regulatory action is not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, and the Board's economic impact assessment, which determined that the Board's proposed regulatory action:

- Will neither create nor eliminate jobs in the State of California;
- Nor result in the elimination of existing businesses;
- Nor create or expand business in the State of California; and
- Will not affect the benefits of Regulation 1603 to the health and welfare of California residents, worker safety, or the state's environment.

The proposed amendments to Regulation 1603 may affect small business.

#### No Mandate on Local Agencies or School Districts

The Board has determined that the adoption of the proposed amendments to Regulation 1603 does not impose a mandate on local agencies or school districts.

#### Public Comments

The Board did not receive any written comments regarding the proposed regulatory action and no interested parties appeared at the public hearing on March 25, 2014, to comment on the proposed regulatory action.

#### Determinations Regarding Alternatives

By its motion on March 25, 2014, the Board determined that no alternative to the proposed amendments to Regulation 1603 would be more effective in carrying out the purposes for which the amendments are proposed, would be as effective and less burdensome to affected private persons than the adopted amendments, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provisions of law.

The Board did not reject any reasonable alternatives to the proposed amendments to Regulation 1603 that would lessen any adverse impact the proposed amendments may have on small business.

No reasonable alternatives have been identified and brought to the Board's attention that would lessen any adverse impact the proposed action may have on small business, be more effective in carrying out the purposes for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.



**Updated Informative Digest for the State Board of Equalization's  
Adoption of Proposed Amendments to California Code of Regulations,  
Title 18, Section 1603, *Taxable Sales of Food Products***

The State Board of Equalization (Board) held a public hearing regarding the proposed amendments to California Code of Regulations, title 18, section (Regulation) 1603, *Taxable Sales of Food Products*, on March 25, 2014. During the public hearing, the Board unanimously voted to adopt the proposed amendments to Regulation 1603 without making any changes.

The Board did not receive any written comments regarding the proposed regulatory action and no interested parties appeared at the public hearing on March 25, 2014, to comment on the proposed regulatory action. There have not been any changes to the applicable laws or the effect of, the objective of, and anticipated benefits from the adoption of the proposed amendments to Regulation 1603 described in the informative digest included in the notice of proposed regulatory action. The informative digest included in the notice of proposed regulatory action provides:

Current Law

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (RTC § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (RTC §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers.

Civil Code section 1656.1 provides that whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. The sales tax reimbursement may be shown as a separately stated amount added to the stated sales price of the tangible personal property or the sales tax reimbursement may be included in the total price charged for tangible personal property. Under Civil Code section 1656.1, it shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property if the retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

Regulation 1700 contains a general presumption that taxable tangible personal property is sold at a price which includes tax reimbursement if the retailer posts a specified sign to that effect.

In 2001, Regulation 1574, *Vending Machine Operators*, was amended to delete the specific requirement that vending machine operators post a sign providing that their sales are made on a tax-included basis and to instead provide that sales of tangible personal property through vending machines are presumed to be made on a tax-included basis notwithstanding the fact that the signage discussed in Civil Code section 1656.1 is not present. The amendments were based on the nature of the vending machine industry and the expectation from customers purchasing items through vending machines that all taxable sales are made on a tax-included basis.

#### Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1603

Mobile food vendors sell food for immediate consumption from motorized vehicles, such as food trucks, or un-motorized carts, such as hot dog carts. Mobile food vendors do not generally have point of sale systems to calculate tax on individual transactions. Additionally, they often make sales in multiple tax districts in a given day and as a result, their sales are often subject to varying tax rates. Therefore, similar to vending machine operators, whose sales are discussed in Regulation 1574, it is common practice in the mobile food industry for mobile food vendors to make sales on a tax-included basis and to round their menu prices to the nearest quarter or dollar. And, similar to the vending machine operators, mobile food vendors intend for the prices that they charge for the meals that they sell to include all applicable taxes, and their customers expect that amounts for sales tax reimbursement are included in the prices charged by the mobile food vendors.

While the industry practice is for mobile food vendors to include sales tax reimbursement in their menu prices, during recent audits, many mobile food vendors did not have a sign posted stating that tax reimbursement was included in their menu prices.

#### *Interested Parties Process*

The Board's Business Taxes Committee (BTC) staff drafted amendments adding a new subdivision (u) to Regulation 1603 to address the mobile food vendors' signage issue. The draft amendments suggested adding provisions to the regulation to describe the term "mobile food vendors" by providing that mobile food vendors include retailers who sell food and beverage for immediate consumption from motorized vehicles or un-motorized carts, and provide that mobile food vendors include vendors operating food trucks, coffee carts, and hot dog carts. The draft amendments also provided that effective July 1, 2014, sales by mobile food vendors are presumed to be made on a tax-included basis, unless a separate amount for tax reimbursement is added to the price. And, the

draft amendments provided that this presumption does not apply when a mobile food vendor is making sales as a “caterer” as defined in subdivision (h)(1) of Regulation 1603.

BTC staff subsequently provided its draft amendments to Regulation 1603 to the interested parties and conducted an interested parties meeting in August 2013, to discuss the draft amendments. During the August meeting, participants discussed the effect of the presumption and asked BTC staff whether the new presumption might have some unintended effects, such as:

- Making it more likely for a person to be held personally liable for sales tax liabilities owed by its mobile food vending business under RTC section 6829;
- Making it more likely for a mobile food vendor to receive the 40 percent penalty imposed under RTC section 6597; and
- Potentially restricting mobile food vendors’ participation in the Board’s Offers in Compromise Program under RTC section 7093.6.

However, as explained in more detail in the initial statement of reasons, BTC staff determined that the potential effect of the new presumption was limited, particularly because the presumption may be overcome. And, BTC staff indicated that it was not necessary to revise the proposed amendments to Regulation 1603 to address the interested parties’ questions because the new presumption, by itself, would not result in personal liability under RTC section 6829 or the imposition of the 40 percent penalty under RTC section 6597, and would not prevent a mobile food vendor from participating in the Offers in Compromise Program.

Following the interested parties meeting, other Board staff recommended that new subdivision (u) be revised to remove the language indicating that the new presumption will be “[e]ffective July 1, 2014” and instead include new language stating that it will apply to “[s]ales made on or after July 1, 2014.” BTC staff agreed that the changes would make the application of the new presumption more clear and revised the draft amendments to the regulation, accordingly.

#### *November 19, 2013, BTC Meeting*

Subsequently, BTC staff prepared Formal Issue Paper 13-009 and distributed it to the Board Members for consideration at the Board’s November 19, 2013, BTC meeting. Formal Issue Paper 13-009 recommended that the Board propose to add new subdivision (u) to Regulation 1603 which generally describes “mobile food vendors,” and provides that, “[f]or sales made on and after July 1, 2014, unless a separate

amount for tax reimbursement is added to the price of meals, a mobile food vendors' sales of taxable items are presumed to be made on a tax included basis," and provide that "[t]his presumption does not apply when a mobile food vendor is making sales as a 'caterer'" as defined in subdivision (h)(1) of Regulation 1603.

At the conclusion of the Board's discussion of Formal Issue Paper 13-009 during the November 19, 2013, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1603 recommended in the formal issue paper.

The Board anticipates that the proposed amendments to Regulation 1603 will promote fairness and benefit taxpayers, Board staff, and the Board by providing regulatory provisions consistent with industry practice and the understanding of mobile food vendors and their customers that mobile food vendors' sales are made on a tax-included basis.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1603 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations. This is because the proposed amendments to Regulation 1603 are consistent with the 2001 amendments to Regulation 1574, discussed above, and there are no other sales and use tax regulations that specifically apply to mobile food vendors' collection of sales tax reimbursement. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1603 or the proposed amendments to Regulation 1603.



## BOARD OF EQUALIZATION

**BUSINESS TAXES COMMITTEE MEETING MINUTES**

HONORABLE BETTY T. YEE, COMMITTEE CHAIR

450 N STREET, SACRAMENTO

MEETING DATE: NOVEMBER 19, 2013, TIME: 10:00 A.M.

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**ACTION ITEMS & STATUS REPORT ITEMS****Agenda Item No: 1****Title: Proposed Regulation 1699, *Permits*.****Issue:**

Should the Board amend Regulation 1699, *Permits*, to clarify Revenue and Taxation Code (RTC) section 6070.5, as enacted by Assembly Bill 1307 (AB 1307) (Stats. 2011. Ch. 734), which gives the Board the authority to either refuse to issue or revoke a seller's permit under certain conditions?

**Committee Discussion:**

Staff introduced the topic for discussion. Mr. Runner asked where the process for reconsiderations for permit refusals was to take place. Staff stated they would occur at the district offices.

Mr. Horton expressed concern that if a person has an outstanding liability and sought another seller's permit in a different type of business, the BOE should not deny the permit if there is no financial risk to the State. Staff confirmed their recommendation allows a person with an outstanding final liability to be issued a seller's permit if they enter into an approved payment plan or offer in compromise.

Since the proposed amendments will be looked at by other staff who will make decisions based on their interpretation of the amendments, Mr. Horton requested that guidance be provided to staff with regard to the concern he expressed. Ms. Yee agreed that outreach and guidance would be helpful.

Mr. Horton suggested and staff agreed it would be appropriate to include the clarification in the Compliance Policy and Procedures Manual (CPPM).

**Committee Action:**

Upon motion by Mr. Horton and seconded by Ms. Mandel, without objection, the Committee approved and authorized for publication amendments to Regulation 1699, *Permits*. The members then directed staff to clarify the proposed amendments through the CPPM. A copy of the proposed amendments to the regulation is attached.

**Agenda Item No: 2****Title: Proposed Amendments to Regulation 1603, *Taxable Sales of Food Products*.****Issue:**

Should the Board amend Regulation 1603, *Taxable Sales of Food Products*, to provide that unless a separate amount for tax reimbursement is added to the price, mobile food vendors' sales of taxable items are presumed to be made on a tax-included basis?

**Committee Discussion:**

Staff introduced the topic for discussion. At the Board's request, staff explained that the planned outreach efforts for this issue consist of notifying taxpayers registered in the Board's database as mobile food vendors, providing information to mobile food vendor associations, and updating industry specific webpages. Mr. Runner expressed the need for creativity to reach those operating in this business industry and suggested outreach to the diverse taxpayer population. Staff noted that it would also consult with the Board's Outreach Services Division for other options. Ms. Steel expressed her overall satisfaction with the proposed amendments and suggested that staff include catering houses in its outreach efforts. Mr. Horton concurred with Ms. Steel and recommended that the outreach reiterate that it is a rebuttable presumption that tax is included in taxable sales. Ms. Yee noted that the Statewide Compliance and Outreach Program should play a role in the outreach efforts, especially with respect to focusing on a business' record-keeping requirements. Ms. Yee further directed staff to consult with the Outreach Services Division and report to the Board with an outreach plan.

**Committee Action:**

Upon motion by Mr. Horton and seconded by Ms. Steel, without objection, the Committee approved and authorized for publication the proposed amendments to Regulation 1603, *Taxable Sales of Food Products*. A copy of the proposed amendments to Regulation 1603 is attached.

/s/ Alan LoFaso for Betty T. Yee

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Honorable Betty T. Yee, Committee Chair

/s/ Cynthia Bridges

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Cynthia Bridges, Executive Director

BOARD APPROVED

at the December 17, 2013 Board Meeting

/s/ Joann Richmond

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Joann Richmond, Chief  
Board Proceedings Division

# Sales And Use Tax Regulations

## ARTICLE 18. ADMINISTRATION—MISCELLANEOUS

### REGULATION 1699

#### REGULATION 1699. PERMITS.

*Reference:* Sections 6066, 6067, 6070, 6070.5, 6071.1, 6072, 6073, 6075 and 6225, Revenue and Taxation Code.

**(a) SELLER'S PERMIT IN GENERAL—NUMBER OF PERMITS REQUIRED.** Every person engaged in the business of selling (or leasing under a lease defined as a sale in Revenue and Taxation Code section 6006(g)) tangible personal property of a kind the gross receipts from the retail sale of which are required to be included in the measure of the sales tax, and only a person actively so engaged, is required to hold a seller's permit for each place of business in this state at which transactions relating to sales are customarily negotiated with his or her customers. For example, a seller's permit is required for a branch sales office at which orders are customarily taken or contracts negotiated, whether or not merchandise is stocked there.

No additional permits are required for warehouses or other places at which merchandise is merely stored and which customers do not customarily visit for the purpose of making purchases and which are maintained in conjunction with a place of business for which a permit is held; but at least one permit must be held by every person maintaining stocks of merchandise in this state for sale. However, permits are required for warehouses or other places at which merchandise is stored and from which retail sales of such merchandise negotiated out of state are delivered or fulfilled.

If two or more activities are conducted by the same person on the same premises, even though in different buildings, only one seller's permit is required. For example, a service station operator having a restaurant in addition to the station on the same premises requires only one seller's permit for both activities.

**(b) PERSONS SELLING IN INTERSTATE COMMERCE OR TO UNITED STATES GOVERNMENT.** A seller's permit is not required to be held by persons all of whose sales are made exclusively in interstate or foreign commerce but a seller's permit is required of persons notwithstanding all their sales (or leases under a lease defined as a sale in Revenue and Taxation Code section 6006(g)) are made to the United States or instrumentalities thereof.

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**(c) PERSONS SELLING FEED.** Effective April 1, 1996, a seller's permit is not required to be held by persons whose sales consist entirely of sales of feed for any form of animal life of a kind the products of which ordinarily constitute food for human consumption (food animals), or for any form of animal life not of such a kind (nonfood animals) which are being held for sale in the regular course of business, provided no other retail sales of tangible personal property are made.

If a seller of hay is also the grower of the hay, this exemption shall apply only if either:

1. The hay is produced for sale only to beef cattle feedlots or dairies, or
2. The hay is sold exclusively through a farmer-owned cooperative.

**(d) CONCESSIONAIRES.** For the purposes of this regulation, the term concessionaire is defined as an independent retailer who is authorized, through contract with, or permission of, another retail business enterprise (the prime retailer), to operate within the perimeter of the prime retailer's own retail business premises, which to all intents and purposes appear to be wholly under the control of that prime retailer, and to make retail sales that to the general public might reasonably be believed to be the transactions of the prime retailer. Some indicators that a retailer is *not* operating as a concessionaire are that he or she:

- Appears to the public to be a business separate and autonomous from the prime retailer. Examples of businesses that may appear to be separate and autonomous, while operating within the prime retailer's premises, are those with signs posted on the premises naming each of such businesses, those with separate cash registers, and those with their own receipts or invoices printed with their business name.
- Maintains separate business records, particularly with respect to sales.
- Establishes his or her own selling prices.
- Makes business decisions independently, such as hiring employees or purchasing inventory and supplies.
- Registers as a separate business with other regulatory agencies, such as an agency issuing business licenses, the Employment Development Department, and/or the Secretary of State.
- Deposits funds into a separate account.

In cases where a retailer is not operating as a concessionaire, the prime retailer is not liable for any tax liabilities of the retailer operating on his or her premises. However, if a retailer is deemed to be operating as a concessionaire, the prime retailer may be held jointly and severally liable for any sales and use taxes imposed on unreported retail sales made by the

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concessionaire while operating as a concessionaire. Such a prime retailer will be relieved of his or her obligation for sales and use tax liabilities incurred by such a concessionaire for the period in which the concessionaire holds a seller's permit for the location of the prime retailer or in cases where the prime retailer obtains and retains a written statement that is taken in good faith in which the concessionaire affirms that he or she holds a seller's permit for that location with the Board. The following essential elements must be included in the statement in order to relieve the prime retailer of his or her liability for any unreported tax liabilities incurred by the concessionaire:

- The seller's permit number of the concessionaire
- The location for which the permit is issued (must show the concessionaire's location within the perimeter of the prime retailer's location)
- Signature of the concessionaire
- Date

While any statement, taken timely, in good faith and containing all of these essential elements will relieve a prime retailer of his or her liability for the unreported sales or use taxes of a concessionaire, a suggested format of an acceptable statement is provided as Appendix A to this regulation. While not required, it is suggested that the statement from the concessionaire contain language to clarify which party will be responsible for reporting and remitting the sales and/or use tax due on his or her retail sales.

In instances where the lessor, or grantor of permission to occupy space, is not a retailer himself or herself, he or she is not liable for any sales or use taxes owed by his or her lessee or grantee. In instances where an independent retailer leases space from another retailer, or occupies space by virtue of the granting of permission by another retailer, but does not operate his or her business within the perimeter of the lessor's or grantor's own retail business, such an independent retailer is not a concessionaire within the meaning of this regulation. In this case, the lessor or grantor is not liable for any sales or use taxes owed by the lessee or grantee.

In the event the retailer fails to make a return and remit the amount of tax due with respect to operations of the concessions, the concessionaires must secure permits and file returns together with remittances of the amount of tax due.

**(e) AGENTS.** If agents make sales on behalf of a principal and do not have a fixed place of business, but travel from house to house or from town to town, it is unnecessary that a seller's permit be obtained for each agent if the principal obtains a permit for each place of business located in California. If, however, the principal does not obtain a permit for each

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place of business located in California, it is necessary for each agent to obtain a seller's permit.

**(f) INACTIVE PERMITS.** A seller's permit may only be held by a person actively engaged in business as a seller of tangible personal property. The Board may revoke a seller's permit where it finds that the person holding the permit is not actively engaged in business as a seller of tangible personal property.

(1) Any person who holds a seller's permit but is not actively engaged in business as a seller of tangible personal property shall promptly surrender the permit by notifying the Board to cancel it.

(2) Except as explained in paragraph (3) of this subdivision, a person holding a seller's permit will be held liable for any taxes, interest, and penalties incurred, through the date on which the Board is notified to cancel the permit, by any other person who, with the permit holder's actual or constructive knowledge, uses the permit in any way. For example, a permit holder may be held liable for tax, interest, and penalty actually incurred by his or her transferee where the transferee displays the permit in his or her place of business, or uses the permit number on a resale certificate, or files sales and use tax returns under the permit number. The permit holder has the burden of establishing that the Board received notice to cancel the permit.

**(A)** The seller's permit holder may notify the Board by delivering the actual seller's permit to the Board with the clear request that the permit be canceled. Where the reason for cancellation is that the permit holder transferred the business, the permit holder should identify the name and address of the transferee at the time the permit is surrendered to the Board. The permit holder may also notify the Board by delivering a written statement or email to the Board that the permit holder has transferred or otherwise ceased the business, or will do so at a specified time, and requesting that the permit be canceled. The statement should identify the name and address of the transferee, if any. The permit holder may also provide this notice to the Board orally, but it will be presumed that such notice was not provided unless the Board's records reflect that the permit holder clearly notified the Board of the cessation or transfer of the business for which the permit was held.

**(B)** The Board will also be regarded as having received notice of cancellation of the seller's permit, and the permit holder will be excused from liability for the tax, interest, and penalty incurred by another person using the permit, as of the date the Board receives actual notice of transfer of the business for which the permit was issued. It will be presumed such notice was not received by the Board unless the Board's records reflect that the Board

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received a clear notice of the cessation or transfer of the business for which the permit was held. For example, the Board's receipt of an application for a seller's permit from the transferee constitutes sufficient notice if it contains adequate information to show that the application pertains to the same business for which the permit was held. Notice to another state agency of a transfer or cessation of a business does not constitute notice to the Board. Rather, the Board must itself receive actual notice of the transfer or cessation of business.

(3) Where the seller's permit holder does not establish that the Board received actual notice of the transfer of the business for which the permit was held and is thus liable for the taxes, interest, and penalties incurred by another person using that permit, that liability is limited to the quarter in which the business was transferred and the three subsequent quarters, and shall not include any penalties imposed on the other person for fraud or intent to evade the tax. However, these limitations (liability only for the quarter in which the business was transferred and the three subsequent quarters and no fraud or intent to evade penalty) do not apply where, after the transfer of the business, 80 percent or more of the real or ultimate ownership of that business is held by the permit holder. For these purposes, stockholders, bondholders, partners, or other persons holding an ownership interest in an entity are regarded as having the "real or ultimate ownership" of that entity.

#### **(g) -NON-ISSUANCE OR REVOCATION OF A SELLER'S PERMIT**

(1) The Board may refuse to issue a seller's permit to any person submitting an application for a seller's permit if the person has an outstanding final liability with the Board for any amount under the Sales and Use Tax Law. The Board may also refuse to issue a seller's permit if the person applying for it is not a natural person and is being controlled by a person with an outstanding final liability for any amount under the Sales and Use Tax Law.

(2) Natural Person - A "natural person" is a living human.

(3) Control and Controlling - For the purposes of this section and as defined in Section 22971 of the Business and Professions Code, the Board defines the words "control" and "controlling" to mean the possession, direct or indirect, of the power to direct or cause the direction of the management and policies of a person. Evidence that a person controls or is controlling another person may include, but is not limited to, the ownership of voting securities, by contract, other than a commercial contract for goods or non-management services, or as otherwise provided below; however, no individual shall be deemed to control a person solely on account of being a director, officer, or employee of that person. It shall

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be a rebuttable presumption that a person has the power to control another person if any of the following apply:

(A) A person holds 25 percent or more of any class of the voting securities issued by a person; or

(B) A person is a general partner in a partnership, a managing member of a limited liability company, or president or director of a closely held corporation; or

(C) A person with an outstanding final liability as described in paragraph (g)(1) transfers the business to a non-natural person in a sale that was not at arm's length. A sale is presumed to be not at arm's length if it is between and among relatives (by blood or marriage, which relationships include, but are not limited to, spouses, parents, children and siblings). A transfer is among relatives if the person with the outstanding final liability is either a natural person who is a relative of the person or persons controlling the non-natural person acquiring the business; or is a non-natural person controlled by a relative or relatives of the person or persons controlling the non-natural person acquiring the business.

(4) A final liability will not be deemed to be outstanding for the purposes of this part if the person with the outstanding liability as described in paragraph (g)(1) has entered into a payment plan pursuant to Revenue and Taxation Code section 6832 and remains in full compliance with it.

(A) If the person submitting an application for a seller's permit has entered into a payment plan as provided in paragraph (g)(4) and fails to comply with the terms of the payment plan, the Board may seek revocation of the seller's permit obtained by the person pursuant to this section.

(5) The Board shall consider offers in compromise when determining whether to issue a seller's permit. If a seller's permit is conditioned on an offer in compromise being entered into, then a final liability will not be deemed outstanding for the purposes of this part, if the offer in compromise has been accepted by the Board and the person has paid the amount in full or remains in full compliance with the compromise plan.

(A) If the person submitting an application for a seller's permit has entered into an offer in compromise as provided in paragraph (g)(5) and fails to comply with the terms of the offer in compromise, the Board may seek revocation of the seller's permit obtained by the person pursuant to this section.

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(6) Whenever any person is denied a permit pursuant to this section, the Board shall give the person written notice of the denial. Any person denied a permit pursuant to this section may make a request for reconsideration by the Board, if submitted in writing within 30 days of the denial. A timely submitted written request for reconsideration shall afford the person a hearing in a manner that is consistent with a hearing provided for by Section 6070. If a request for reconsideration is not filed within the 30-day period, the denial becomes final.

**(gh) DUE DATE OF RETURNS—CLOSEOUT OF ACCOUNT ON YEARLY REPORTING**

**BASIS.** Where a person authorized to file tax returns on a yearly basis transfers the business to another person or discontinues it before the end of the yearly period, a closing return shall be filed with the Board on or before the last day of the month following the close of the calendar quarter in which the business was transferred or discontinued.

**(ih) BUYING COMPANIES—GENERAL.**

(1) DEFINITION. For the purpose of this regulation, a buying company is a legal entity that is separate from another legal entity that owns, controls, or is otherwise related to, the buying company and which has been created for the purpose of performing administrative functions, including acquiring goods and services, for the other entity. It is presumed that the buying company is formed for the operational reasons of the entity which owns or controls it or to which it is otherwise related. A buying company formed, however, for the sole purpose of purchasing tangible personal property ex-tax for resale to the entity which owns or controls it or to which it is otherwise related in order to re-direct local sales tax from the location(s) of the vendor(s) to the location of the buying company shall not be recognized as a separate legal entity from the related company on whose behalf it acts for purposes of issuing it a seller's permit. Such a buying company shall not be issued a seller's permit. Sales of tangible personal property to third parties will be regarded as having been made by the entity owning, controlling, or otherwise related to the buying company. A buying company that is not formed for the sole purpose of so re-directing local sales tax shall be recognized as a separate legal entity from the related company on whose behalf it acts for purposes of issuing it a seller's permit. Such a buying company shall be issued a seller's permit and shall be regarded as the seller of tangible personal property it sells or leases.

(2) ELEMENTS. A buying company is not formed for the sole purpose of re-directing local sales tax if it has one or more of the following elements:

**(A)** Adds a markup to its cost of goods sold in an amount sufficient to cover its operating and overhead expenses.

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**(B)** Issues an invoice or otherwise accounts for the transaction.

The absence of any of these elements is not indicative of a sole purpose to redirect local sales tax.

**(ji) WEB SITES.** The location of a computer server on which a web site resides may not be issued a seller's permit for sales tax purposes except when the retailer has a proprietary interest in the server and the activities at that location otherwise qualify for a seller's permit under this regulation.

**(kj) USE TAX PERMIT - QUALIFIED PURCHASERS.** Except for the purchase of a vehicle, vessel, or aircraft, a person who meets all of the following conditions is required to register and report and pay use tax directly to the Board:

(1) The person is not required to hold a seller's permit.

(2) The person is not required to be registered pursuant to Revenue and Taxation Code section 6226.

(3) The person is not a holder of a use tax direct payment permit as described in Revenue and Taxation Code section 7051.3.

(4) The person receives at least one hundred thousand dollars (\$100,000) in gross receipts from business operations per calendar year.

(5) The person is not otherwise registered with the board to report use tax.

The return must show the total sales price of the tangible personal property purchased by the qualified purchaser, the storage, use, or other consumption of which became subject to the use tax during the preceding calendar year, for which the qualified purchaser did not pay tax to a retailer required to collect the tax or a retailer the qualified purchaser reasonably believed was required to collect the tax. Notwithstanding Revenue and Taxation Code sections 6451, 6452, 6452.1, and 6455, the returns for the 2009 calendar year and subsequent years shall be filed with the Board, together with a remittance of the amount of the tax due, on or before April 15 of the succeeding calendar year.

*[Appendix A was omitted for ease of review]*

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**REGULATION 1603. TAXABLE SALES OF FOOD PRODUCTS.**

*Reference:* Sections 6006, 6012, 6359, 6359.1, 6359.45, 6361, 6363, 6363.5, 6363.6, 6363.8, 6370, 6373, 6374, and 6376.5, Revenue and Taxation Code.

**(a) RESTAURANTS, HOTELS, BOARDING HOUSES, SODA FOUNTAINS, AND SIMILAR ESTABLISHMENTS.****(1) DEFINITIONS.**

**(A) Boarding House.** The term "Boarding House" as used in this regulation means any establishment regularly serving meals on the average to five or more paying guests. The term includes a "guest home," "residential care home," "halfway house," and any other establishment providing room and board or board only, which is not an institution as defined in Regulation 1503 and section 6363.6 of the Revenue and Taxation Code. The fact that guests may be recipients of welfare funds does not affect the application of tax. A person or establishment furnishing meals on the average to fewer than five paying guests during the calendar quarter is not considered to be engaged in the business of selling meals at retail.

**(B) American Plan Hotel.** The term "American Plan Hotel" as used in this regulation means a hotel which charges guests a fixed sum by the day, week, or other period for room and meals combined.

**(C) Complimentary Food and Beverages.** As used in this subdivision (a), the term "complimentary food and beverages" means food and beverages (including alcoholic and non-alcoholic beverages) which are provided to transient guests on a complimentary basis and:

1. There is no segregation between the charges for rooms and the charges for the food and beverages on the guests' bills, and
2. The guests are not given an option to refuse the food and beverages in return for a discounted room rental.

**(D) Average Retail Value of Complimentary Food and Beverages.** The term "average retail value of complimentary food and beverages" (ARV) as used in this regulation means the total amount of the costs of the complimentary food and beverages for the preceding calendar year marked-up one hundred percent (100%) and divided by the number of rooms rented for that year. Costs of complimentary food and beverages include charges for delivery to the lodging establishment but exclude discounts taken and sales tax reimbursement paid to vendors. The 100% markup factor includes the cost of food preparation labor by hotel employees, the fair rental value of hotel facilities used to prepare or serve the food and beverages, and profit.

**(E) Average Daily Rate.** The term "average daily rate" (ADR) as used in this regulation means the gross room revenue for the preceding calendar year divided by the number of rooms rented for that year. "Gross room revenue" means and includes the full charge to the hotel customers but excludes separately stated occupancy taxes, revenue from contract and group rentals which do not qualify for complimentary food and beverages, and revenue from special packages (e.g., New Year's Eve packages which include food and beverages as well as guest room accommodations), unless it can be documented that the retail value of the food and beverages provided as a part of the special package is 10% or less of the total package charge as provided in subdivision (a)(2)(B). "Number of rooms rented for that year" means the total number of times all rooms have been rented on a nightly basis provided the revenue for those

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rooms is included in the "gross room revenue". For example, if a room is rented out for three consecutive nights by one guest, that room will be counted as rented three times when computing the ADR.

## (2) APPLICATION OF TAX.

**(A) In General.** Tax applies to sales of meals or hot prepared food products (see (e) below) furnished by restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments whether served on or off the premises. In the case of American Plan hotels, special packages offered by hotels, e.g., a New Year's Eve package as described in subdivision (a)(1)(E), and boarding houses, a reasonable segregation must be made between the charges for rooms and the charges for the meals, hot prepared food products, and beverages. Charges by hotels or boarding houses for delivering meals or hot prepared food products to, or serving them in, the rooms of guests are includable in the measure of tax on the sales of the meals or hot prepared food products whether or not the charges are separately stated. (Caterers, see (h) below.) Sales of meals or hot prepared food products by restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments to persons such as event planners, party coordinators, or fundraisers, which buy and sell on their own account, are sales for resale for which a resale certificate may be accepted (see subdivision (h)(3)(C)2.).

Soufflé cups, straws, paper napkins, toothpicks and like items that are not of a reusable character which are furnished with meals or hot prepared food products are sold with the meals or hot prepared food products. Sales of such items for such purpose to persons engaged in the business of selling meals or hot prepared food products are, accordingly, sales for resale.

**(B) Complimentary Food and Beverages.** Lodging establishments which furnish, prepare, or serve complimentary food and beverages to guests in connection with the rental of rooms are consumers and not retailers of such food and beverages when the retail value of the complimentary food and beverages is "incidental" to the room rental service regardless of where within the hotel premises the complimentary food and beverages are served. For complimentary food and beverages to qualify as "incidental" for the current calendar year, the average retail value of the complimentary food and beverages (ARV) furnished for the preceding calendar year must be equal to or less than 10% of the average daily rate (ADR) for that year.

If a hotel provides guests with coupons or similar documents which may be exchanged for complimentary food and beverages in an area of the hotel where food and beverages are sold on a regular basis to the general public (e.g., a restaurant), the hotel will be considered the consumer and not the retailer of such food and beverages if the coupons or similar documents are non-transferable and the guest is specifically identified by name. If the coupons or similar documents are transferable or the guest is not specifically identified, food and beverages provided will be considered sold to the guest at the fair retail value of similar food and beverages sold to the general public. In the case of coupons redeemed by guests at restaurants not operated by the lodging establishment, the hotel will be considered the consumer of food and beverages provided to the hotel's guests and tax will apply to the charge by the restaurant to the hotel.

Lodging establishments are retailers of food and beverages which do not qualify as "incidental" and tax applies as provided in subdivision (a)(2)(A) above. Amounts paid by guests for food and beverages in excess of a complimentary allowance are gross receipts subject to the tax. Lodging establishments are retailers of otherwise complimentary food and beverages sold to non-guests.

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In the case of hotels with concierge floor, club level or similar programs, the formula set forth above shall be applied separately with respect to the complimentary food and beverages furnished to guests who participate in the concierge, club or similar program. That is, the concierge, club or similar program will be deemed to be an independent hotel separate and apart from the hotel in which it is operated. The ADR and the retail value of complimentary food and beverages per occupied room will be computed separately with respect to the guest room accommodations entitled to the privileges and amenities involved in the concierge, club or similar program.

The following example illustrates the steps in determining whether the food and beverages are complimentary:

**FORMULA:**  $ARV \div ADR < 10\%$

**Average Daily Rate (ADR):**

Room Revenue	\$9,108,000
Rooms Rented	74,607
ADR ( $\$9,108,000 \div 74,607$ )	\$122.08

**Average Retail Value of Complimentary Food and Beverages (ARV):**

Complimentary Food Cost	\$169,057
Complimentary Beverage Cost	52,513
Total	\$221,570
Add 100% Markup	221,570
Average Retail Value	\$443,140
ARV per occupied room ( $\$443,140 \div 74,607$ )	\$5.94

**Application of Formula:**  $\$5.94 \div \$122.08 = 4.87\%$

In the above example, the average retail value of the complimentary food and beverages per occupied room for the preceding calendar year is equal to or less than 10% of the average daily rate. Therefore, under the provisions of this subdivision (a)(2)(B), the complimentary food and beverages provided to guests for the current calendar year qualify as "incidental". The lodging establishment is the consumer and not the retailer of such food and beverages. This computation must be made annually.

When a lodging establishment consists of more than one location, the operations of each location will be considered separately in determining if that location's complimentary food and beverages qualify as incidental.

**(C) "Free" Meals.** When a restaurant agrees to furnish a "free" meal to a customer who purchases another meal and presents a coupon or card, which the customer previously had purchased directly from the restaurant or through a sales promotional agency having a contract with the restaurant to redeem the coupons or cards, the restaurant is regarded as selling two meals for the price of one, plus any additional compensation from the agency or from its own sales of coupons. Any such additional compensation is a part of its taxable gross receipts for the period in which the meals are served.

Tax applies only to the price of the paid meal plus any such additional compensation.

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**(b) "DRIVE-INS."** Tax applies to sales of food products ordinarily sold for immediate consumption on or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the "drive-in" establishment, even though such products are sold on a "take out" or "to go" order and are actually packaged or wrapped and taken from the premises of the retailer. Food products when sold in bulk, i.e., in quantities or in a form not suitable for consumption on the retailer's premises, are not regarded as ordinarily sold for immediate consumption on or near the location at which parking facilities are provided by the retailer. Accordingly, with the exception of sales of hot prepared food products (see (e) below) and sales of cold food under the 80-80 rule (see (c) below), sales of ice cream, doughnuts, and other individual food items in quantities obviously not intended for consumption on the retailer's premises, without eating utensils, trays or dishes and not consumed on the retailer's premises, are exempt from tax. Any retailer claiming a deduction on account of food sales of this type must support the deduction by complete and detailed records.\*

\* The records acceptable in support of such a deduction are:

(a) A sales ticket prepared for each transaction claimed as being tax exempt showing:

- (1) Date of the sale,
  - (2) The kind of merchandise sold,
  - (3) The quantity of each kind of merchandise sold,
  - (4) The price of each kind of merchandise sold,
  - (5) The total price of merchandise sold,
  - (6) A statement to the effect that the merchandise purchased is not to be consumed on or near the location at which parking facilities are provided by the retailer, and
- (b) A daily sales record kept in sufficient detail to permit verification by audit that all gross receipts from sales have been accounted for and that all sales claimed as being tax exempt are included therein.

**(c) COLD FOOD SOLD ON A "TAKE-OUT" ORDER.**

**(1) GENERAL.**

**(A) Seller Meeting Criteria of 80-80 Rule.** When a seller meets both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax applies to sales of cold food products (including sales for a separate price of hot bakery goods and hot beverages such as coffee) in a form suitable for consumption on the seller's premises even though such food products are sold on a "take-out" or "to go" order. Sales of cold food products which are suitable for consumption on the seller's premises are subject to the tax no matter how great the quantity purchased, e.g., 40 one-half pint containers of milk. Except as provided elsewhere in this regulation, tax does not apply to sales of food products which are furnished in a form not suitable for consumption on the seller's premises.

Operative April 1, 1996, although a seller may meet both criteria of the 80-80 rule, he or she may elect to separately account for the sale of "take-out" or "to go" orders of cold food products which are in a form suitable for consumption on the seller's premises. The gross receipts from the sale of those food products shall be exempt from the tax provided the seller keeps a separate accounting of these transactions in his or her records. Tax will remain applicable to the sale of food products as provided in subdivisions (a), (b), (e), or (f) of this regulation. Failure to maintain the required separate accounting and documentation claimed as exempt under this subdivision will revoke the seller's election under this subdivision.

**(B) Seller Not Meeting Criteria of 80-80 Rule.** When a seller does not meet both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax does not apply to sales of cold food products (including sales for a separate price of hot bakery goods and hot beverages such as coffee) when sold on a "take-out" or "to go" order.

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**(2) DEFINITIONS.**

**(A)** For purposes of this subdivision (c), the term "suitable for consumption on the seller's premises" means food products furnished:

1. In a form which requires no further processing by the purchaser, including but not limited to cooking, heating, thawing, or slicing, and
2. In a size which ordinarily may be immediately consumed by one person such as a large milk shake, a pint of ice cream, a pint of milk, or a slice of pie. Cold food products (excluding milk shakes and similar milk products) furnished in containers larger in size than a pint are considered to be in a form not suitable for immediate consumption.

Pieces of candy sold in bulk quantities of one pound or greater are deemed to be sold in a form not suitable for consumption on the seller's premises.

The term does not include cold food products which obviously would not be consumed on the premises of the seller, e.g., a cold party tray or a whole cold chicken.

**(B)** For purposes of this subdivision (c), the term "seller's premises" means the individual location at which a sale takes place rather than the aggregate of all locations of the seller. For example, if a seller operates several drive-in and fast food restaurants, the operations of each location stand alone and are considered separately in determining if the sales of food products at each location meet the criteria of the 80-80 rule.

When two or more food-selling activities are conducted by the same person at the same location, the operations of all food related activities will be considered in determining if the sales of food products meet the criteria of the 80-80 rule. For example, if a seller operates a grocery store and a restaurant with no physical separation other than separate cash registers, the grocery store operations will be included in determining if the sales of food products meet the criteria of the 80-80 rule. When there is a physical separation where customers of one operation may not pass freely into the other operation, e.g., separate rooms with separate entrances but a common kitchen, each operation will be considered separately for purposes of this subdivision (c).

**(3) 80-80 RULE.** Tax applies under this subdivision (c) only if the seller meets *both* of the following criteria:

**(A)** More than 80 percent of the seller's gross receipts are from the sale of food products, and

**(B)** More than 80 percent of the seller's retail sales of food products are taxable as provided in subdivisions (a), (b), (e), and (f) of this regulation.

Sales of alcoholic beverages, carbonated beverages, or cold food to go not suitable for immediate consumption should not be included in this computation. Any seller meeting both of these criteria and claiming a deduction for the sale of cold food products in a form not suitable for consumption on the seller's premises must support the deduction by complete and detailed records of such sales made.

**(d) PLACES WHERE ADMISSION IS CHARGED.**

**(1) GENERAL.** Tax applies to sales of food products when sold within, and for consumption within, a place the entrance to which is subject to an admission charge, during the period when

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the sales are made, except for national and state parks and monuments, and marinas, campgrounds, and recreational vehicle parks.

(2) DEFINITIONS.

(A) "Place" means an area the exterior boundaries of which are defined by walls, fences or otherwise in such a manner that the area readily can be recognized and distinguished from adjoining or surrounding property. Examples include buildings, fenced enclosures and areas delimited by posted signs.

(B) "Within a place" means inside the door, gate, turnstile, or other point at which the customer must pay an admission charge or present evidence, such as a ticket, that an admission charge has been paid. Adjacent to, or in close proximity to, a place is not within a place.

(C) "Admission charge" means any consideration required to be paid in money or otherwise for admittance to a place.

"Admission charge" does not include:

1. Membership dues in a club or other organization entitling the member to, among other things, entrance to a place maintained by the club or organization, such as a fenced area containing a club house, tennis courts, and a swimming pool. Where a guest is admitted to such a place only when accompanied by or vouched for by a member of the club or organization, any charge made to the guest for use of facilities in the place is not an admission charge.

2. A charge for a student body card entitling the student to, among other things, entrance to a place, such as entrance to a school auditorium at which a dance is held.

3. A charge for the use of facilities within a place to which no entrance charge is made to spectators. For example, green fees paid for the privilege of playing a golf course, a charge made to swimmers for the use of a pool within a place, or a charge made for the use of lanes in a public bowling place.

(D) "National and state parks and monuments" means those which are part of the National Park System or the State Park System. The phrase does not include parks and monuments not within either of those systems, such as city, county, regional, district or private parks.

(3) PRESUMPTION THAT FOOD IS SOLD FOR CONSUMPTION WITHIN A PLACE. When food products are sold within a place the entrance to which is subject to an admission charge, it will be presumed, in the absence of evidence to the contrary, that the food products are sold for consumption within the place. Obtaining and retaining evidence in support of the claimed tax exemption is the responsibility of the retailer. Such evidence may consist, for example, of proof that the sales were of canned jams, cake mixes, spices, cooking chocolate, or other items in a form in which it is unlikely that such items would be consumed within the place where sold.

(4) FOOD SOLD TO STUDENTS. The exemption otherwise granted by Section 6363 does not apply to sales of food products to students when sold within, and for consumption within, a place the entrance to which is subject to an admission charge, and such sales are subject to tax except as provided in (p) of this regulation. For example, when food products are sold by a student organization to students or to both students and nonstudents within a place the entrance to which is subject to an admission charge, such as a place where school athletic events are held, the sales to both students and nonstudents are taxable.

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**(e) HOT PREPARED FOOD PRODUCTS.**

(1) **GENERAL.** Tax applies to all sales of hot prepared food products unless otherwise exempt. "Hot prepared food products" means those products, items, or components which have been prepared for sale in a heated condition and which are sold at any temperature which is higher than the air temperature of the room or place where they are sold. The mere heating of a food product constitutes preparation of a hot prepared food product, e.g., grilling a sandwich, dipping a sandwich bun in hot gravy, using infra-red lights, steam tables, etc. If the sale is intended to be of a hot food product, such sale is of a hot food product regardless of cooling which incidentally occurs. For example, the sale of a toasted sandwich intended to be in a heated condition when sold, such as a fried ham sandwich on toast, is a sale of a hot prepared food product even though it may have cooled due to delay. On the other hand, the sale of a toasted sandwich which is not intended to be in a heated condition when sold, such as a cold tuna sandwich on toast, is not a sale of a hot prepared food product. When a single price has been established for a combination of hot and cold food items, such as a meal or dinner which includes cold components or side items, tax applies to the entire established price regardless of itemization on the sales check. The inclusion of any hot food product in an otherwise cold combination of food products sold for a single established price, results in the tax applying to the entire established price, e.g., hot coffee served with a meal consisting of cold food products, when the coffee is included in the established price of the meal. If a single price for the combination of hot and cold food items is listed on a menu, wall sign or is otherwise advertised, a single price has been established. Except as otherwise provided in (b), (c), (d) or (f) of this regulation, or in regulation 1574, tax does not apply to the sale for a separate price of bakery goods, beverages classed as food products, or cold or frozen food products. Hot bakery goods and hot beverages such as coffee are hot prepared food products but their sale for a separate price is exempt unless taxable as provided in (b), (c), (d) or (f) of this regulation, or in Regulation 1574. Tax does apply if a hot beverage and a bakery product or cold food product are sold as a combination for a single price. Hot soup, bouillon, or consommé is a hot prepared food product which is not a beverage.

(2) **AIR CARRIERS ENGAGED IN INTERSTATE OR FOREIGN COMMERCE.** Tax does not apply to the sale, storage, use, or other consumption of hot prepared food products sold by caterers or other vendors to air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers, nor to the sale, storage, use, or other consumption of hot prepared food products sold or served to passengers by air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers. "Air carriers" are persons or firms in the business of transporting persons or property for hire or compensation, and include both common and contract carriers. "Passengers" do not include crew members. Any caterer or other vendor claiming the exemption must support it with an exemption certificate from the air carrier substantially in the form prescribed in Appendix A of this regulation.

**(f) FOOD FOR CONSUMPTION AT FACILITIES PROVIDED BY THE RETAILER.** Tax applies to sales of sandwiches, ice cream, and other foods sold in a form for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others.

A passenger's seat aboard a train, or a spectator's seat at a game, show, or similar event is not a "chair" within the meaning of this regulation. Accordingly, except as otherwise provided in (c), (d), and (e) above, tax does not apply to the sale of cold sandwiches, ice cream, or other food products sold by vendors passing among the passengers or spectators where the food products

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are not "for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer."

**(g) TIPS, GRATUITIES, AND SERVICE CHARGES.**

This subdivision applies to restaurants, hotels, caterers, boarding houses, soda fountains, drive-ins and similar establishments.

An optional payment designated as a tip, gratuity, or service charge is not subject to tax. A mandatory payment designated as a tip, gratuity, or service charge is included in taxable gross receipts, even if the amount is subsequently paid by the retailer to employees.

**(1) OPTIONAL PAYMENT.**

**(A)** A payment of a tip, gratuity, or service charge is optional if the customer adds the amount to the bill presented by the retailer, or otherwise leaves a separate amount in payment over and above the actual amount due the retailer for the sale of meals, food, and drinks that include services. The following examples illustrate transactions where a payment of a tip, gratuity or service charge is optional and not included in taxable gross receipts. This is true regardless of printed statements on menus, brochures, advertisements or other materials notifying customers that tips, gratuities, or service charges will or may be added by the retailer to the prices of meals, food, or drinks:

Example 1. The restaurant check is presented to the customer with the "tip" area blank so the customer may voluntarily write in an amount, or

Example 2. The restaurant check is presented to the customer with options computed by the retailer and presented to the customer as tip suggestions. The "tip" area is blank so the customer may voluntarily write in an amount:

*Guest Check*

Food Item A	\$9.95
Beverage Item B	3.75
Subtotal	\$13.70
8% sales tax	1.10
Subtotal	\$14.80
Tip*	
Total	

\*Suggested tips:

15%=\$2.06; 18%=\$2.47; 20%=\$2.74; other

If an employer misappropriates these payments for these charges, as discussed in subdivision (g)(1)(B) below, such payments are included in the retailer's taxable gross receipts.

**(B)** No employer shall collect, take, or receive any gratuity or a part thereof, paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of such gratuity, or require an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer. (Labor

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Code Section 351.) If this prohibition is violated, any amount of such gratuities received by the employer will be considered a part of the gross receipts of the employer and subject to the tax.

(2) MANDATORY PAYMENT.

(A) An amount negotiated between the retailer and the customer in advance of a meal, food, or drinks, or an event that includes a meal, food, or drinks is mandatory.

(B) When the menu, brochures, advertisements or other printed materials contain statements that notify customers that tips, gratuities, or service charges will or may be added, an amount automatically added by the retailer to the bill or invoice presented to and paid by the customer is a mandatory charge and subject to tax. These amounts are considered negotiated in advance as specified in subdivision (g)(2)(A). Examples of printed statements include:

"An 18% gratuity [or service charge] will be added to parties of 8 or more."

"Suggested gratuity 15%," itemized on the invoice or bill by the restaurant, hotel, caterer, boarding house, soda fountain, drive-in or similar establishment.

"A 15%voluntary gratuity will be added for parties of 8 or more."

An amount will be considered "automatically added" when the retailer adds the tip to the bill without first conferring with the customer after service of the meal and receiving approval to add the tip or without providing the customer with the option to write in the tip. Nonetheless, any amount added by the retailer is presumed to be mandatory. This presumption may be overcome as discussed in subdivision (g)(2)(C) below.

(C) It is presumed that an amount added as a tip by the retailer to the bill or invoice presented to the customer is mandatory. A statement on the bill or invoice that the amount added by the retailer is a "suggested tip," "optional gratuity," or that "the amount may be increased, decreased, or removed" by the customer does not change the mandatory nature of the charge.

This presumption may be controverted by documentary evidence showing that the customer specifically requested and authorized the gratuity be added to the amount billed.

Examples of documentary evidence that may be used to overcome the presumption include:

1. A guest check that is presented to the customer showing sales tax reimbursement and the amount upon which it was computed, without tip or with the "tip" area blank and a separate document, such as a credit card receipt, to which the retailer adds or prints the requested tip.
2. Guest receipts and payments showing that the percentage of tips paid by large groups varies from the percentage stated on the menu, brochure, advertisement or other printed materials.
3. A retailer's written policy stating that its employees shall receive confirmation from a customer before adding a tip together with additional verifiable evidence that the policy has been enforced. The policy is not in itself sufficient documentation to establish that the customer requested and authorized that a gratuity be added to the amount billed without such additional verifiable evidence.

The retailer must retain the guest checks and any additional separate documents to show that the payment is optional. The retailer is also required to maintain other records in accordance with the requirements of Regulation 1698, *Records*.

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**(h) CATERERS.**

(1) DEFINITION. The term "caterer" as used in this regulation means a person engaged in the business of serving meals, food, or drinks on the premises of the customer, or on premises supplied by the customer, including premises leased by the customer from a person other than the caterer, but does not include employees hired by the customer by the hour or day.

(2) SALES TO CATERERS. A caterer generally is considered to be the consumer of tangible personal property normally used in the furnishing and serving of meals, food or drinks, except for separately stated charges by the caterer for the lease of tangible personal property or tangible personal property regarded as being sold with meals, food or drinks such as disposable plates, napkins, utensils, glasses, cups, stemware, place mats, trays, covers and toothpicks.

**(3) SALES BY CATERERS.**

**(A) Caterer as Retailer.** Tax applies to the entire charge made by caterers for serving meals, food, and drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals, whether performed by the caterer, the caterer's employees or subcontractors. Tax applies to charges made by caterers for preparing and serving meals and drinks even though the food is not provided by the caterers. Tax applies to charges made by caterers for hot prepared food products as in (e) above whether or not served by the caterers. A caterer who separately states or itemizes charges for the lease of tangible personal property regardless of the use of the property will be deemed to be the lessor of such property. Tax applies in accordance with Regulation 1660 Leases of Tangible Personal Property—In General. Tax does not apply to charges made by caterers for the rental of dishes, silverware, glasses, etc., purchased by the caterer with tax paid on the purchase price if no food is provided or served by the caterers in connection with such rental.

**(B) Caterers as Lessors of Property Unrelated to the Serving or Furnishing of Meals, Food, or Drinks by a Caterer.**

1. When a caterer who is furnishing or serving meals, food, or drinks also rents or leases from a third party tangible personal property which the caterer does not use himself or herself and the property is not customarily provided or used within the catering industry in connection with the furnishing and serving of food or drinks, such as decorative props related solely to optional entertainment, special lighting for guest speakers, sound or video systems, dance floors, stages, etc., he or she is a lessor of such property. In such instance, tax applies to the lease in accordance with Regulation 1660.

2. When a person who in other instances is a caterer does not furnish or serve any meals, food, or drinks to a customer, but rents or leases from a third party tangible personal property such as dishes, linen, silverware and glasses, etc., for purposes of providing it to his or her customer, he or she is not acting as a caterer within the meaning of this regulation, but solely as a lessor of tangible personal property. In such instances tax applies to the lease in accordance with Regulation 1660.

**(C) Caterers Planning, Designing and Coordinating Events.**

1. Tax applies to charges by a caterer for event planning, design, coordination, and/or supervision if they are made in connection with the furnishing of meals, food, or drinks for the event. Tax does not apply to separately stated charges for services unrelated to the furnishing and serving of meals, food, or drinks, such as optional entertainment or any staff who do not

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directly participate in the preparation, furnishing, or serving of meals, food, or drinks, e.g., coat-check clerks, parking attendants, security guards, etc.

2. When a caterer sells meals, food, or drinks, and the serving of them, to other persons such as event planners, party coordinators, or fundraisers, who buy and sell the same on their own account or for their own sake, it is a sale for resale for which the caterer may accept a resale certificate. However, a caterer may only claim the sale as a resale if the caterer obtains a resale certificate in compliance with Regulation 1668. A person is buying or selling for his or her own account, or own sake, when such person has his or her own contract with a customer to sell the meals, food, or drinks to the customer, and is not merely acting on behalf of the caterer.

3. When a caterer sells meals, food or drinks and the serving of them to other persons who charge a fee for their service unrelated to the taxable sale, the separately stated fee is not subject to tax.

**(D) Sales of Meals by Caterers to Social Clubs, Fraternal Organizations.** Sales of meals to social clubs and fraternal organizations, as those terms are defined in subdivision (i) below, by caterers are sales for resale if such social clubs and fraternal organizations are the retailers of the meals subject to tax under subdivision (i) and give valid resale certificates therefor.

**(E) Tips, Gratuities, or Service Charges.** Tips, gratuities, and service charges are discussed in subdivision (g).

(4) PREMISES. GENERAL. Separately stated charges for the lease of premises on which meals, food, or drinks are served, are nontaxable leases of real property. Where a charge for leased premises is a guarantee against a minimum purchase of meals, food or drinks, the charge for the guarantee is gross receipts subject to tax. Where a person contracts to provide both premises and meals, food or drinks, the charge for the meals, food or drinks must be reasonable in order for the charge for the premises to be non taxable.

(5) PRIVATE CHEFS. A private chef is generally not an employee of the customer, but an independent contractor who pays his or her own social security, and federal and state income taxes. Such a private chef, who prepares and serves meals, food and drinks in the home of his or her customer is a caterer under this regulation.

**(i) SOCIAL CLUBS AND FRATERNAL ORGANIZATIONS.** "Social Clubs and Fraternal Organizations" as used herein include any corporation, partnership, association or group or combination acting as a unit, such as service clubs, lodges, and community, country, and athletic clubs.

The tax applies to receipts from the furnishing of meals, food, and drink by social clubs and fraternal organizations unless furnished: (1) exclusively to members; and also, (2) less frequently than once a week. Both these requirements must be met. If the club or organization furnishes meals, food or drink to nonmembers, all receipts from the furnishing of meals, food or drink are subject to tax whether furnished to members or nonmembers, including receipts on occasions when furnished exclusively to members. Meals, food or drink paid for by members are considered furnished to them even though consumed by guests who are not members.

#### **(j) STUDENT MEALS.**

##### **(1) DEFINITIONS.**

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**(A) "Food Products."** As used herein, the term "food products" as defined in Regulation 1602 (18 CCR 1602) includes food furnished, prepared, or served for consumption at tables, chairs, or counters, or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare or serve food to others.

**(B) "Meals."** As used herein, the term "meals" includes both food and nonfood products, which are sold to students for an established single price at a time set aside for meals. If a single price for the combination of a nonfood product and a food product is listed on a menu or on a sign, a single price has been established. The term "meals" does not include nonfood products which are sold to students for a separate price and tax applies to the sales of such products. Examples of nonfood products are: carbonated beverages and beer. For the purpose of this regulation, products sold at a time designated as a "nutrition break", "recess", or similar break, will not be considered "meals".

**(2) APPLICATION OF TAX.**

**(A) Sales By Schools, School Districts and Student Organizations.** Sales of meals or food products for human consumption to students of a school by public or private schools, school districts, and student organizations, are exempt from tax, except as otherwise provided in (d)(4) above.

**(B) Sales by Parent-Teacher Associations.** Tax does not apply to the sale of, nor the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served to the students of a school by parent-teacher associations. Parent-teacher associations qualifying under Regulation 1597 as consumers are not retailers of tangible personal property, which they sell. Accordingly, tax does apply to the sale to such associations of nonfood items such as carbonated beverages, containers, straws and napkins.

**(C) Sales by Blind Vendors.** Tax does not apply to the sale of meals or food products for human consumption to students of a school by any blind person (as defined in Section 19153 of the Welfare and Institutions Code) operating a restaurant or vending stand in an educational institution under Article 5 of Chapter 6 of Part 2 of Division 10 of the Welfare and Institutions Code, except as otherwise provided in (d)(4) above.

**(D) Sales by Caterers.** The application of tax to sales by caterers in general is explained in subdivision (h) above. However, tax does not apply to the sale by caterers of meals or food products for human consumption to students of a school, if all the following criteria are met:

1. The premises used by the caterer to serve the lunches to the students are used by the school for other purposes, such as sporting events and other school activities, during the remainder of the day;
2. The fixtures and equipment used by the caterer are owned and maintained by the school; and
3. The students purchasing the meals cannot distinguish the caterer from the employees of the school.

**(k) EMPLOYEES' MEALS.**

**(1) IN GENERAL.** Any employer or employee organization that is in the business of selling meals, e.g., a restaurant, hotel, club, or association, must include its receipts from the sales of meals to employees, along with its receipts from sales to other purchasers of meals, in the

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amount upon which it computes its sales tax liability. An employer or an employee organization selling meals only to employees becomes a retailer of meals and liable for sales tax upon its receipts from sales of meals if it sells meals to an average number of five or more employees during the calendar quarter.

(2) **SPECIFIC CHARGE.** The tax applies only if a specific charge is made to employees for the meals. Tax does not apply to cash paid an employee in lieu of meals. A specific charge is made for meals if:

(A) Employee pays cash for meals consumed.

(B) Value of meals is deducted from employee's wages.

(C) Employee receives meals in lieu of cash to bring compensation up to legal minimum wage.

(D) Employee has the option to receive cash for meals not consumed.

(3) **NO SPECIFIC CHARGE.** If an employer makes no specific charge for meals consumed by employees, the employer is the consumer of the food products and the non-food products, which are furnished to the employees as a part of the meals.

In the absence of any of the conditions under (k)(2) a specific charge is not made if:

(A) A value is assigned to meals as a means of reporting the fair market value of employees' meals pursuant to state and federal laws or regulations or union contracts.

(B) Employees who do not consume available meals have no recourse on their employer for additional cash wages.

(C) Meals are generally available to employees, but the duties of certain employees exclude them from receiving the meals and are paid cash in lieu thereof.

(4) **MEALS CREDITED TOWARD MINIMUM WAGE.** If an employee receives meals in lieu of cash to bring his or her compensation up to the legal minimum wage, the amount by which the minimum wage exceeds the amount otherwise paid to the employee is includable in the employer's taxable gross receipts up to the value of the meals credited toward the minimum wage.

For example, if the minimum rate for an eight-hour day is \$46.00, and the employee received \$43.90 in cash, and a lunch is received which is credited toward the minimum wage in the maximum allowable amount of \$2.10, the employer has received gross receipts in the amount of \$2.10 for the lunch.

(5) **TAX REIMBURSEMENT.** If a separately stated amount for tax reimbursement is not added to the price of meals sold to employees for which a specific charge is made, the specific charge will be regarded as being a tax-included charge for the meals.

(f) **RELIGIOUS ORGANIZATIONS.** Tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served by any religious organization at a social or other gathering conducted by it or under its auspices, if the purpose in furnishing or serving the meals and food products is to obtain revenue for the functions and activities of the organization and the revenue obtained from furnishing or serving the meals and food products is actually used in carrying on such functions

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and activities. For the purposes of this regulation, "religious organization" means any organization the property of which is exempt from taxation pursuant to Subdivision (f) of section 3 of Article XIII of the State Constitution.

**(m) INSTITUTIONS.** Tax does not apply to the sale of, nor the storage, use, or other consumption in this state of, meals and food products for human consumption furnished or served to and consumed by patients or residents of an "institution" as defined in Regulation 1503. Tax, however, does apply to the sale of meals and food products by an institution to persons other than patients or residents of that institution.

**(n) MEAL PROGRAMS FOR LOW-INCOME ELDERLY PERSONS.** Tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served to low-income elderly persons at or below cost by a nonprofit organization or governmental agency under a program funded by this state or the United States for such purposes.

**(o) FOOD PRODUCTS, NONALCOHOLIC BEVERAGES AND OTHER TANGIBLE PERSONAL PROPERTY TRANSFERRED BY NONPROFIT YOUTH ORGANIZATIONS.** See Regulation 1597 for application of tax on food products, nonalcoholic beverages and other tangible personal property transferred by nonprofit youth organizations.

**(p) NONPROFIT PARENT-TEACHER ASSOCIATIONS.** Nonprofit parent-teacher associations and equivalent organizations qualifying under Regulation 1597 are consumers and not retailers of tangible personal property, which they sell.

**(q) MEALS AND FOOD PRODUCTS SERVED TO CONDOMINIUM RESIDENTS.** Tax does not apply to the sale of and the storage, use, or other consumption in this state of meals and food products for human consumption furnished to and consumed by persons 62 years of age or older residing in a condominium and who own equal shares in a common kitchen facility; provided, that the meals and food products are served to such persons on a regular basis.

This exemption is applicable only to sales of meals and food products for human consumption prepared and served at the common kitchen facility of the condominium. Tax applies to sales to persons less than 62 years of age.

**(r) VETERAN'S ORGANIZATION.** Beginning April 1, 2004, tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served by any nonprofit veteran's organization at a social or other gathering conducted by it or under its auspices, if the purpose in furnishing or serving the meals and food products is to obtain revenue for the functions and activities of the organization and the revenue obtained from furnishing or serving the meals and food products is actually used in carrying on those functions and activities.

**(s) FOOD STAMP COUPONS.** Tax does not apply to tangible personal property, which is eligible to be purchased with federal food stamp coupons acquired pursuant to the Food Stamp Act of 1977 and so purchased. When payment is made in the form of both food stamps and cash, the amount of the food stamp coupons must be applied first to tangible personal property normally subject to the tax, e.g., nonalcoholic carbonated beverages. Retailers are prohibited from adding any amount designated as sales tax, use tax, or sales tax reimbursement to sales of tangible personal property purchased with food stamp coupons. (See paragraph (c) of Regulation 1602.5 for special reporting provisions by grocers.)

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**(t) HONOR SYSTEM SNACK SALES.** An "honor system snack sale" means a system where customers take snacks from a box or tray and pay by depositing money in a container provided by the seller. Snacks sold through such a system may be subject to tax depending upon where the sale takes place. Sales of such snacks are taxable when sold at or near a lunchroom, break room, or other facility that provides tables and chairs, and it is contemplated that the food sold will normally be consumed at such facilities. Honor system snack sales do not include hotel room mini-bars or snack baskets.

**(u) Mobile Food Vendors.** Mobile food vendors include retailers who sell food and beverages for immediate consumption from motorized vehicles or un-motorized carts. Examples of mobile food vendors include food trucks, coffee carts, and hot dog carts. For sales made on or after July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors' sales of taxable items are presumed to be made on a tax-included basis.

This presumption does not apply when a mobile food vendor is making sales as a "caterer" as defined in (h)(1).

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STATE OF CALIFORNIA

STATE BOARD OF EQUALIZATION

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Third District, Orange County

JEROME E. HORTON  
Fourth District, Los Angeles

JOHN CHIANG  
State Controller

CYNTHIA BRIDGES  
Executive Director

November 15, 2013

Dear Interested Party:

On November 8, 2013, staff sent an issue paper regarding proposed amendments to Regulation 1603, *Taxable Sales of Food Products*, to provide that unless a separate amount for tax reimbursement is added to the price, mobile food vendors' sales of taxable items are presumed to be made on a tax-included basis. After the paper was distributed, staff received a suggestion that clarifies our intent that the revisions have a prospective application as explained in the original issue paper. After review and consideration, we agree that the recommended wording is clearer than our original proposal. Accordingly, we have revised the affected sections of the enclosed issue paper (Agenda, page 2 and Exhibit 2, page 25) and will present this revised paper at the Business Taxes Committee meeting on November 19, 2013.

If you have any questions about this issue, please contact Ms. Lynn Whitaker in the Business Taxes Committee Team at (916) 324-8483.

Sincerely,

Jeffrey L. McGuire, Deputy Director  
Sales and Use Tax Department

JLM: llw

Enclosures

cc: (all with enclosures)

Honorable Jerome E. Horton, Chairman, Fourth District

Honorable Michelle Steel, Vice Chair, Third District

Honorable Betty T. Yee, Member, First District (MIC:71)

Senator George Runner (Ret.), Member, Second District (via email)

Honorable John Chiang, State Controller, c/o Ms. Marcy Jo Mandel

(via email)

Mr. David Hunter, Board Member's Office, Fourth District

Mr. Michael Vigil, Board Member's Office, Fourth District

Mr. Neil Shah, Board Member's Office, Third District

Mr. Tim Treichelt, Board Member's Office, Third District

Mr. Alan LoFaso, Board Member's Office, First District

Ms. Mengjun He, Board Member's Office, First District

Mr. Sean Wallentine, Board Member's Office, Second District

Mr. James Kuhl, Board Member's Office, Second District

Mr. Lee Williams, Board Member's Office, Second District

Mr. Alan Giorgi, Board Member's Office, Second District

Ms. Lynne Kinst, Board Member's Office, Second District

Ms. Natasha Ralston Ratcliff, State Controller's Office

Ms. Cynthia Bridges (MIC:73)

Mr. Randy Ferris (MIC:83)

Mr. Robert Tucker (MIC:82)

Mr. Bradley Heller (MIC:82)

Mr. Cary Huxsoll (MIC:82)

Mr. Lawrence Mendel (MIC:82)

Ms. Susanne Buehler (MIC:92)

Mr. Bradley Miller (MIC:92)

Ms. Kirsten Stark (MIC:50)

Mr. Clifford Oakes (MIC:50)

Mr. Robert Wilke (MIC:50)

Formal Issue Paper Number 13-009

**Agenda**  
**Page 1 of 2**



**REVISED AGENDA — November 19, 2013 Business Taxes Committee Meeting**  
**Regulation 1603, Taxable Sales of Food Products**  
**Mobile Food Vendors – Presumption of Tax-Included Sales**

<p><b>Action 1 -</b></p> <p><b>Proposed Amendments to Regulation 1603</b></p>	<p><i>(Only the proposed new subdivision of this regulation has been provided. Other subdivisions of the regulation are not being amended.)</i></p> <p><u><b>(u) Mobile Food Vendors.</b> Mobile food vendors include retailers who sell food and beverages for immediate consumption from motorized vehicles or un-motorized carts. Examples of mobile food vendors include food trucks, coffee carts, and hot dog carts. <del>Effective</del> For sales made on or after July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors' sales of taxable items are presumed to be made on a tax-included basis.</u></p> <p><u>This presumption does not apply when a mobile food vendor is making sales as a “caterer” as defined in (h)(1).</u></p>
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Issue Paper Number 13-009



BOARD OF EQUALIZATION  
KEY AGENCY ISSUE

- ☐ Board Meeting
- ☒ Business Taxes Committee
- ☐ Customer Services and Administrative Efficiency Committee
- ☐ Legislative Committee
- ☐ Property Tax Committee
- ☐ Other

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## Proposed Revisions to Regulation 1603, *Taxable Sales of Food Products* Mobile Food Vendors – Presumption of Tax-Included Sales

### I. Issue

Should the Board amend Regulation 1603, *Taxable Sales of Food Products*, to provide that unless a separate amount for tax reimbursement is added to the price, mobile food vendors' sales of taxable items are presumed to be made on a tax-included basis?

### II. Alternative 1 – Staff Recommendation

Staff recommends the Board approve and authorize publication of revisions to Regulation 1603, *Taxable Sales of Food Products*, to provide that beginning July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors' sales of taxable items are presumed to be made on a tax-included basis. The presumption would not apply when a mobile food vendor is making sales as a caterer as defined in Regulation 1603 (h)(1). See Exhibit 2 for proposed revisions.

### III. Other Alternative Considered – Alternative 2

Do not amend Regulation 1603, *Taxable Sales of Food Products*.

## IV. Background

Mobile food vendors include retailers who sell food and beverages for immediate consumption from motorized vehicles or un-motorized carts. Examples include food trucks that sell packaged snacks, bottled drinks, and hot/cold food made ahead of time or prepared to order in the vehicle. Mobile food vendors also include un-motorized mobile food carts such as hot dog, popcorn, and coffee carts. Mobile food vendors typically travel to multiple locations selling items to many customers; however, some mobile food vendors occasionally cater events where they sell food and beverages to one customer.

In general, mobile food vendors are subject to the same sales tax reporting and recordkeeping requirements as brick-and-mortar restaurants. Because most mobile food vendors do not have a fixed physical location, the vendor must also keep track of where sales are made and report tax at the rate in effect at the location where the sales occurred. Mobile food vendors are frequently cash-based businesses that do not use a cash register or issue sales receipts. In addition to accepting cash, some vendors may also accept credit cards using a point of sale system to account for those sales. For convenience when handling cash, mobile food vendors commonly sell items on a tax-included basis and round prices to the nearest dollar or quarter.

Audits performed by the Board of Equalization (BOE) in the last few years revealed that many mobile food vendors were unaware of their reporting responsibilities and did not maintain adequate records for sales tax purposes. In addition, while the industry standard is to include tax in their pricing, many mobile food vendors did not have a sign posted stating that tax was included in menu prices.

## V. Discussion

### *Tax-Included Prices*

Sales and Use Tax Regulation 1700, *Reimbursement for Sales Tax*, provides that whether a retailer may add sales tax reimbursement to the sales price of tangible personal property depends on the terms of the agreement of sale. Subdivision (a)(2) of Regulation 1700 provides:

Presumptions. Certain presumptions concerning the addition of sales tax reimbursements are created by Civil Code Section 1656.1. It shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property sold at retail to a purchaser if:

- (A) The agreement of sale expressly provides for such addition of sales tax reimbursement;
- (B) Sales tax reimbursement is shown on the sales check or other proof of sale; or
- (C) The retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

It shall be presumed that the property, the gross receipts from the sale of which is subject to the sales tax, is sold at a price which includes tax reimbursement if the retailer posts in his or her premises, or includes on a price tag or in an advertisement (whichever is applicable) one of the following notices:

1. "All prices of taxable items include sales tax reimbursement computed to the nearest mill."
2. "The price of this item includes sales tax reimbursement computed to the nearest mill."

Since it is common practice in the mobile food vendor industry to sell items for a tax-included price, staff proposes that if a mobile food vendor does not add a separately stated amount for tax reimbursement, the vendor's sales of taxable items will be presumed to be tax-included. Staff does not recommend the presumption apply, however, when the mobile food vendor acts as a caterer (see discussion below). Because this is a change in BOE policy, staff further recommends a prospective treatment which will allow staff time to notify taxpayers of the change before it goes into effect. Accordingly, under the staff proposal, beginning July 1, 2014, the signage requirement under Regulation 1700 will no longer apply to mobile food vendors. This change is not unprecedented; the tax-included signage requirement was previously removed for sales made through vending machines.

In 2001, Regulation 1574, *Vending Machine Operators*, was revised to eliminate the requirement that vending machine operators have a tax-included statement affixed or posted near vending machines in order for sales to be considered tax-included. The revision was based on the nature of the vending machine industry and the expectation from customers purchasing items through vending machines that all taxable sales are made on a tax-included basis. At the time of the revision, staff determined that although Civil Code section 1656.1 provides certain presumptions about when a sale is regarded as tax-included, it does not preclude the Board from making a regulatory finding that transactions not specifically covered in section 1656.1 are also tax-included. Accordingly, staff believes the Board has the authority to make a similar provision with regard to mobile food vendors.

Like vending machine customers, staff believes that customers of mobile food vendors assume or expect sales to be tax-included when the final sales price is rounded to the dollar or quarter. Staff's proposed revision presumes that taxable sales are tax-included when the vendor does not add a separate amount for tax reimbursement to the price. Thus, vendors who wish to add reimbursement may do so.

#### ***Mobile Food Vendors Acting as Caterers***

As noted in the Background section, a mobile food vendor may also make sales as a "caterer" as defined by Regulation 1603 subdivision (h)(1). That is, a mobile food vendor will be considered a caterer when hired by a customer to serve food or drinks on the premises of the customer, or on premises supplied by the customer. For example, a food truck is hired to cater a private party. The vendor parks in the customer's parking lot and provides food and drinks for 100 people for a single sales price to one customer. For consistency with other catering businesses and because the nature of operations for catering sales differ, staff proposes that when mobile food vendors are making sales as caterers, the presumption that the sale is made on a tax-included basis would not apply.

#### ***Tax-Included Presumption – Section 6597 Penalty, Section 6829 Personal Liability, and OIC***

During the interested parties process, staff noted that there may be unintended consequences of adding a presumption that mobile food vendors' taxable sales are sold on a tax-included basis. Specifically, there was discussion of potential unintended consequences involving:

- Application of penalty under Revenue and Taxation Code (RTC) section 6597. RTC section 6597 imposes a 40% penalty if taxpayers collect sales tax reimbursement or use tax but fail to pay it to BOE.

- Personal liability under RTC section 6829. Under certain circumstances, responsible individuals may be liable for unpaid tax, penalty, and interest owed by corporations, partnerships, limited liability partnerships, and limited liability companies. One of the requirements for liability under section 6829 is that BOE must establish that the business entity included tax reimbursement or added tax reimbursement to the selling price of the property sold.
- Disqualification from the Offers in Compromise (OIC) Program. Under RTC section 7093.6, a final tax liability for an ongoing business may be compromised when certain conditions are met. One of these conditions is that BOE finds no evidence that the taxpayer collected sales tax reimbursement or use tax from the purchaser.

After review and discussion, staff does not believe the proposed revision will negatively impact mobile food vendors because it is a rebuttable presumption that may be overcome. In addition, staff also believes the instances in which a taxpayer would need to rebut the presumption are uncommon. For example, the 40% penalty requires that there is clear and convincing evidence of intent to evade the tax and personal liability under RTC section 6829 requires evidence that the taxpayer willfully failed to pay the taxes due. Thus, rebuttal of the presumption will only be an issue if staff has met the clear and convincing standard or the willfulness requirement. With regard to OIC, staff checked with the OIC Section and since the OIC program began in 2003, staff could only recall one case in which a mobile food vendor made an offer where the taxpayer would have needed to rebut the presumption. Further, because the presumption is rebuttable, we believe that it would not prevent an otherwise appropriate case from participating in the OIC program.

Notwithstanding the discussion above, whether there is evidence to rebut the presumption will be evaluated on a case by case basis. Factors include, but are not limited to, the taxpayer's experience and history of reporting and recordkeeping, observations made by staff regarding tax-included signs or menu statements, taxpayer's use of guest checks or receipts, and any taxpayer statements to Board staff.

## **VI. Alternative 1 - Staff Recommendation**

### **A. Description of Alternative 1**

Staff recommends the Board approve and authorize publication of revisions to Regulation 1603 to provide that beginning July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors' sales of taxable items are presumed to be made on a tax-included basis. The presumption would not apply when a mobile food vendor makes sales as a caterer as defined in Regulation 1603 (h)(1).

### **B. Pros of Alternative 1**

- It is common for mobile food vendors to sell items on a tax-included basis and round prices to the nearest dollar or quarter. This alternative would relieve the taxpayer from the requirement to post a sign stating that sales are tax-included.
- The revision would provide regulatory support for making a tax-included adjustment in an audit when the mobile food vendor claims sales were for a tax-included price but did not have a tax-included sign posted, or cannot prove they had a sign posted. This will be helpful in audits where the taxpayer has minimal records available.

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- Taxpayers who wish to separately add reimbursement to their sales prices may continue to do so.
- When making sales as caterers, mobile food vendors will receive the same tax treatment as other caterers.

**C. Cons of Alternative 1**

- There may be situations where a taxpayer will want to rebut the presumption, for example, a taxpayer in an ongoing business that makes an offer in compromise will need to rebut the presumption.
- It could be argued that a presumption is not needed because under Regulation 1700, taxpayers can easily make their sales tax-included by posting a sign stating that tax is included.

**D. Statutory or Regulatory Change for Alternative 1**

No statutory change is required. However, staff's recommendation does require a regulatory change.

**E. Operational Impact of Alternative 1**

Staff will publish proposed revisions to Regulation 1603 and thereby begin the formal rulemaking process. When the revisions are approved, staff will update the BOE webpage for mobile food vendors.

**F. Administrative Impact of Alternative 1**

**1. Cost Impact**

The workload associated with publishing the regulation and updating the BOE webpage is considered routine. Any corresponding cost would be absorbed within the BOE's existing budget.

**2. Revenue Impact**

None. See Revenue Estimate (Exhibit 1).

**G. Taxpayer/Customer Impact of Alternative 1**

Mobile food vendors wishing to sell products on a tax-included basis will no longer be required to post a sign stating that taxable sales include sales tax.

**H. Critical Time Frames of Alternative 1**

Staff expects the Office of Administrative Law will complete their review and approval before July 1, 2014.

**VII. Alternative 2**

**A. Description of Alternative 2**

Do not amend Regulation 1603.

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**B. Pros of Alternative 2**

The BOE would not incur the workload associated with processing and publicizing the amended regulation.

**C. Cons of Alternative 2**

Mobile food vendors that sell on a tax-included basis will still be required to post a sign stating that tax is included in taxable sales.

**D. Statutory or Regulatory Changes for Alternative 2**

None.

**E. Operational Impact of Alternative 2**

None.

**F. Administrative Impact of Alternative 2**

**1. Cost Impact**

None.

**2. Revenue Impact**

None. See Revenue Estimate (Exhibit 1).

**G. Taxpayer/Customer Impact of Alternative 2**

Mobile food vendors that sell on a tax-included basis will still be required to post a sign stating that tax is included in taxable sales.

**H. Critical Time Frames for Alternative 2**

None.

**Preparer/Reviewer Information**

Prepared by: Tax Policy Division, Sales and Use Tax Department

Current as of: November 5, 2013

**REVENUE ESTIMATE**

STATE OF CALIFORNIA  
BOARD OF EQUALIZATION



BOARD OF EQUALIZATION  
**REVENUE ESTIMATE**

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**Proposed Revisions to Regulation 1603,  
*Taxable Sales of Food Products*  
Mobile Food Vendors – Presumption of Tax-Included Sales**

**I. Issue**

Should the Board amend Regulation 1603, *Taxable Sales of Food Products*, to provide that, unless a separate amount for tax reimbursement is added to the price, mobile food vendors' sales of taxable items are presumed to be made on a tax-included basis?

**Alternative 1 - Staff Recommendation**

Staff recommends the Board approve and authorize publication of revisions to Regulation 1603 to provide that beginning July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors' sales of taxable items are presumed to be made on a tax-included basis. The presumption would not apply when a mobile food vendor is making sales as a caterer as defined in Regulation 1603 (h)(1).

**II. Other Alternative(s) Considered**

Do not amend Regulation 1603.

**Background, Methodology, and Assumptions**

**Alternative 1 – Staff Recommendation**

There is nothing in staff recommendation that would impact revenue. Staff recommendation establishes a regulation consistent with common practice in the mobile food vendor industry that sells items on a tax-included basis and rounds prices to the nearest dollar or quarter. In addition, staff recommendation would relieve the taxpayer from the requirement to post a sign stating that sales are tax-included. Finally, staff recommendation would provide regulatory support for making a tax-included adjustment in an audit when the mobile food vendor claims sales were for a tax-included price but did not have a tax-included sign posted, or cannot prove they had a sign posted.



**FORMAL ISSUE PAPER 13-009**

**Other Alternatives Considered**

Alternative 2 – Do not approve proposed amendments to Regulation 1603.

There is nothing in alternative 2 that would impact sales and use tax revenue.

**Revenue Summary**

Alternative 1 – staff recommendation does not have a revenue impact.

Alternative 2 – alternative 2 does not have a revenue impact.

**Preparation**

Mr. Bill Benson, Jr., Research and Statistics Section, Legislative and Research Division, prepared this revenue estimate. This estimate has been reviewed by Mr. Joe Fitz, Chief, Research and Statistics Section, Legislative and Research Division, and Ms. Susanne Buehler, Chief, Tax Policy Division, Sales and Use Tax Department. For additional information, please contact Mr. Benson at (916) 445-0840.

Current as of October 29, 2013.

## **REGULATION 1603. TAXABLE SALES OF FOOD PRODUCTS.**

### **(a) RESTAURANTS, HOTELS, BOARDING HOUSES, SODA FOUNTAINS, AND SIMILAR ESTABLISHMENTS.**

#### **(1) DEFINITIONS.**

**(A) Boarding House.** The term "Boarding House" as used in this regulation means any establishment regularly serving meals on the average to five or more paying guests. The term includes a "guest home," "residential care home," "halfway house," and any other establishment providing room and board or board only, which is not an institution as defined in Regulation 1503 and section 6363.6 of the Revenue and Taxation Code. The fact that guests may be recipients of welfare funds does not affect the application of tax. A person or establishment furnishing meals on the average to fewer than five paying guests during the calendar quarter is not considered to be engaged in the business of selling meals at retail.

**(B) American Plan Hotel.** The term "American Plan Hotel" as used in this regulation means a hotel which charges guests a fixed sum by the day, week, or other period for room and meals combined.

**(C) Complimentary Food and Beverages.** As used in this subdivision (a), the term "complimentary food and beverages" means food and beverages (including alcoholic and non-alcoholic beverages) which are provided to transient guests on a complimentary basis and:

1. There is no segregation between the charges for rooms and the charges for the food and beverages on the guests' bills, and
2. The guests are not given an option to refuse the food and beverages in return for a discounted room rental.

**(D) Average Retail Value of Complimentary Food and Beverages.** The term "average retail value of complimentary food and beverages" (ARV) as used in this regulation means the total amount of the costs of the complimentary food and beverages for the preceding calendar year marked-up one hundred percent (100%) and divided by the number of rooms rented for that year. Costs of complimentary food and beverages include charges for delivery to the lodging establishment but exclude discounts taken and sales tax reimbursement paid to vendors. The 100% markup factor includes the cost of food preparation labor by hotel employees, the fair rental value of hotel facilities used to prepare or serve the food and beverages, and profit.

**(E) Average Daily Rate.** The term "average daily rate" (ADR) as used in this regulation means the gross room revenue for the preceding calendar year divided by the number of rooms rented for that year. "Gross room revenue" means and includes the full charge to the hotel customers but excludes separately stated occupancy taxes, revenue from contract and group rentals which do not qualify for complimentary food and beverages, and revenue from special packages (e.g., New Year's Eve packages which include food and beverages as well as guest room accommodations), unless it can be documented that the retail value of the food and beverages provided as a part of the special package is 10% or less of the total package charge as provided in subdivision (a)(2)(B). "Number of rooms rented for that year" means the total number of times all rooms have been rented on a nightly basis provided the revenue for those rooms is included in the "gross room revenue". For example, if a room is rented out for three

consecutive nights by one guest, that room will be counted as rented three times when computing the ADR.

**(2) APPLICATION OF TAX.**

**(A) In General.** Tax applies to sales of meals or hot prepared food products (see (e) below) furnished by restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments whether served on or off the premises. In the case of American Plan hotels, special packages offered by hotels, e.g., a New Year's Eve package as described in subdivision (a)(1)(E), and boarding houses, a reasonable segregation must be made between the charges for rooms and the charges for the meals, hot prepared food products, and beverages. Charges by hotels or boarding houses for delivering meals or hot prepared food products to, or serving them in, the rooms of guests are includable in the measure of tax on the sales of the meals or hot prepared food products whether or not the charges are separately stated. (Caterers, see (h) below.) Sales of meals or hot prepared food products by restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments to persons such as event planners, party coordinators, or fundraisers, which buy and sell on their own account, are sales for resale for which a resale certificate may be accepted (see subdivision (h)(3)(C)2.).

Soufflé cups, straws, paper napkins, toothpicks and like items that are not of a reusable character which are furnished with meals or hot prepared food products are sold with the meals or hot prepared food products. Sales of such items for such purpose to persons engaged in the business of selling meals or hot prepared food products are, accordingly, sales for resale.

**(B) Complimentary Food and Beverages.** Lodging establishments which furnish, prepare, or serve complimentary food and beverages to guests in connection with the rental of rooms are consumers and not retailers of such food and beverages when the retail value of the complimentary food and beverages is "incidental" to the room rental service regardless of where within the hotel premises the complimentary food and beverages are served. For complimentary food and beverages to qualify as "incidental" for the current calendar year, the average retail value of the complimentary food and beverages (ARV) furnished for the preceding calendar year must be equal to or less than 10% of the average daily rate (ADR) for that year.

If a hotel provides guests with coupons or similar documents which may be exchanged for complimentary food and beverages in an area of the hotel where food and beverages are sold on a regular basis to the general public (e.g., a restaurant), the hotel will be considered the consumer and not the retailer of such food and beverages if the coupons or similar documents are non-transferable and the guest is specifically identified by name. If the coupons or similar documents are transferable or the guest is not specifically identified, food and beverages provided will be considered sold to the guest at the fair retail value of similar food and beverages sold to the general public. In the case of coupons redeemed by guests at restaurants not operated by the lodging establishment, the hotel will be considered the consumer of food and beverages provided to the hotel's guests and tax will apply to the charge by the restaurant to the hotel.

Lodging establishments are retailers of food and beverages which do not qualify as "incidental" and tax applies as provided in subdivision (a)(2)(A) above. Amounts paid by guests for food and beverages in excess of a complimentary allowance are gross receipts subject to the tax. Lodging establishments are retailers of otherwise complimentary food and beverages sold to non-guests.

In the case of hotels with concierge floor, club level or similar programs, the formula set forth above shall be applied separately with respect to the complimentary food and beverages furnished to guests who participate in the concierge, club or similar program. That is, the concierge, club or similar program will be deemed to be an independent hotel separate and apart from the hotel in which it is operated. The ADR and the retail value of complimentary food and beverages per occupied room will be computed separately with respect to the guest room accommodations entitled to the privileges and amenities involved in the concierge, club or similar program.

The following example illustrates the steps in determining whether the food and beverages are complimentary:

**FORMULA:**  $ARV \div ADR < 10\%$

**Average Daily Rate (ADR):**

Room Revenue	\$9,108,000
Rooms Rented	74,607
ADR ( $\$9,108,000 \div 74,607$ )	\$122.08

**Average Retail Value of Complimentary Food and Beverages (ARV):**

Complimentary Food Cost	\$169,057
Complimentary Beverage Cost	52,513
Total	\$221,570
Add 100% Markup	221,570
Average Retail Value	\$443,140
ARV per occupied room ( $\$443,140 \div 74,607$ )	\$5.94

**Application of Formula:**  $\$5.94 \div \$122.08 = 4.87\%$

In the above example, the average retail value of the complimentary food and beverages per occupied room for the preceding calendar year is equal to or less than 10% of the average daily rate. Therefore, under the provisions of this subdivision (a)(2)(B), the complimentary food and beverages provided to guests for the current calendar year qualify as "incidental". The lodging establishment is the consumer and not the retailer of such food and beverages. This computation must be made annually.

When a lodging establishment consists of more than one location, the operations of each location will be considered separately in determining if that location's complimentary food and beverages qualify as incidental.

**(C) "Free" Meals.** When a restaurant agrees to furnish a "free" meal to a customer who purchases another meal and presents a coupon or card, which the customer previously had purchased directly from the restaurant or through a sales promotional agency having a contract with the restaurant to redeem the coupons or cards, the restaurant is regarded as selling two meals for the price of one, plus any additional compensation from the agency or from its own sales of coupons. Any such additional compensation is a part of its taxable gross receipts for the period in which the meals are served.

Tax applies only to the price of the paid meal plus any such additional compensation.

**(b) "DRIVE-INS."** Tax applies to sales of food products ordinarily sold for immediate consumption on or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the "drive-in" establishment, even though such products are sold on a "take out" or "to go" order and are actually packaged or wrapped and taken from the premises of the retailer. Food products when sold in bulk, i.e., in quantities or in a form not suitable for consumption on the retailer's premises, are not regarded as ordinarily sold for immediate consumption on or near the location at which parking facilities are provided by the retailer. Accordingly, with the exception of sales of hot prepared food products (see (e) below) and sales of cold food under the 80-80 rule (see (c) below), sales of ice cream, doughnuts, and other individual food items in quantities obviously not intended for consumption on the retailer's premises, without eating utensils, trays or dishes and not consumed on the retailer's premises, are exempt from tax. Any retailer claiming a deduction on account of food sales of this type must support the deduction by complete and detailed records.\*

\* The records acceptable in support of such a deduction are:

(a) A sales ticket prepared for each transaction claimed as being tax exempt showing:

- (1) Date of the sale,
  - (2) The kind of merchandise sold,
  - (3) The quantity of each kind of merchandise sold,
  - (4) The price of each kind of merchandise sold,
  - (5) The total price of merchandise sold,
  - (6) A statement to the effect that the merchandise purchased is not to be consumed on or near the location at which parking facilities are provided by the retailer, and
- (b) A daily sales record kept in sufficient detail to permit verification by audit that all gross receipts from sales have been accounted for and that all sales claimed as being tax exempt are included therein.

**(c) COLD FOOD SOLD ON A "TAKE-OUT" ORDER.**

**(1) GENERAL.**

**(A) Seller Meeting Criteria of 80-80 Rule.** When a seller meets both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax applies to sales of cold food products (including sales for a separate price of hot bakery goods and hot beverages such as coffee) in a form suitable for consumption on the seller's premises even though such food products are sold on a "take-out" or "to go" order. Sales of cold food products which are suitable for consumption on the seller's premises are subject to the tax no matter how great the quantity purchased, e.g., 40 one-half pint containers of milk. Except as provided elsewhere in this regulation, tax does not apply to sales of food products which are furnished in a form not suitable for consumption on the seller's premises.

Operative April 1, 1996, although a seller may meet both criteria of the 80-80 rule, he or she may elect to separately account for the sale of "take-out" or "to go" orders of cold food products which are in a form suitable for consumption on the seller's premises. The gross receipts from the sale of those food products shall be exempt from the tax provided the seller keeps a separate accounting of these transactions in his or her records. Tax will remain applicable to the sale of food products as provided in subdivisions (a), (b), (e), or (f) of this regulation. Failure to maintain the required separate accounting and documentation claimed as exempt under this subdivision will revoke the seller's election under this subdivision.

**(B) Seller Not Meeting Criteria of 80-80 Rule.** When a seller does not meet both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax does not apply to sales of cold food

products (including sales for a separate price of hot bakery goods and hot beverages such as coffee) when sold on a "take-out" or "to go" order.

**(2) DEFINITIONS.**

**(A)** For purposes of this subdivision (c), the term "suitable for consumption on the seller's premises" means food products furnished:

1. In a form which requires no further processing by the purchaser, including but not limited to cooking, heating, thawing, or slicing, and

2. In a size which ordinarily may be immediately consumed by one person such as a large milk shake, a pint of ice cream, a pint of milk, or a slice of pie. Cold food products (excluding milk shakes and similar milk products) furnished in containers larger in size than a pint are considered to be in a form not suitable for immediate consumption.

Pieces of candy sold in bulk quantities of one pound or greater are deemed to be sold in a form not suitable for consumption on the seller's premises.

The term does not include cold food products which obviously would not be consumed on the premises of the seller, e.g., a cold party tray or a whole cold chicken.

**(B)** For purposes of this subdivision (c), the term "seller's premises" means the individual location at which a sale takes place rather than the aggregate of all locations of the seller. For example, if a seller operates several drive-in and fast food restaurants, the operations of each location stand alone and are considered separately in determining if the sales of food products at each location meet the criteria of the 80-80 rule.

When two or more food-selling activities are conducted by the same person at the same location, the operations of all food related activities will be considered in determining if the sales of food products meet the criteria of the 80-80 rule. For example, if a seller operates a grocery store and a restaurant with no physical separation other than separate cash registers, the grocery store operations will be included in determining if the sales of food products meet the criteria of the 80-80 rule. When there is a physical separation where customers of one operation may not pass freely into the other operation, e.g., separate rooms with separate entrances but a common kitchen, each operation will be considered separately for purposes of this subdivision (c).

**(3) 80-80 RULE.** Tax applies under this subdivision (c) only if the seller meets *both* of the following criteria:

**(A)** More than 80 percent of the seller's gross receipts are from the sale of food products, and

**(B)** More than 80 percent of the seller's retail sales of food products are taxable as provided in subdivisions (a), (b), (e), and (f) of this regulation.

Sales of alcoholic beverages, carbonated beverages, or cold food to go not suitable for immediate consumption should not be included in this computation. Any seller meeting both of these criteria and claiming a deduction for the sale of cold food products in a form not suitable for consumption on the seller's premises must support the deduction by complete and detailed records of such sales made.

**(d) PLACES WHERE ADMISSION IS CHARGED.**

(1) GENERAL. Tax applies to sales of food products when sold within, and for consumption within, a place the entrance to which is subject to an admission charge, during the period when the sales are made, except for national and state parks and monuments, and marinas, campgrounds, and recreational vehicle parks.

(2) DEFINITIONS.

(A) "Place" means an area the exterior boundaries of which are defined by walls, fences or otherwise in such a manner that the area readily can be recognized and distinguished from adjoining or surrounding property. Examples include buildings, fenced enclosures and areas delimited by posted signs.

(B) "Within a place" means inside the door, gate, turnstile, or other point at which the customer must pay an admission charge or present evidence, such as a ticket, that an admission charge has been paid. Adjacent to, or in close proximity to, a place is not within a place.

(C) "Admission charge" means any consideration required to be paid in money or otherwise for admittance to a place.

"Admission charge" does not include:

1. Membership dues in a club or other organization entitling the member to, among other things, entrance to a place maintained by the club or organization, such as a fenced area containing a club house, tennis courts, and a swimming pool. Where a guest is admitted to such a place only when accompanied by or vouched for by a member of the club or organization, any charge made to the guest for use of facilities in the place is not an admission charge.

2. A charge for a student body card entitling the student to, among other things, entrance to a place, such as entrance to a school auditorium at which a dance is held.

3. A charge for the use of facilities within a place to which no entrance charge is made to spectators. For example, green fees paid for the privilege of playing a golf course, a charge made to swimmers for the use of a pool within a place, or a charge made for the use of lanes in a public bowling place.

(D) "National and state parks and monuments" means those which are part of the National Park System or the State Park System. The phrase does not include parks and monuments not within either of those systems, such as city, county, regional, district or private parks.

(3) PRESUMPTION THAT FOOD IS SOLD FOR CONSUMPTION WITHIN A PLACE. When food products are sold within a place the entrance to which is subject to an admission charge, it will be presumed, in the absence of evidence to the contrary, that the food products are sold for consumption within the place. Obtaining and retaining evidence in support of the claimed tax exemption is the responsibility of the retailer. Such evidence may consist, for example, of proof that the sales were of canned jams, cake mixes, spices, cooking chocolate, or other items in a form in which it is unlikely that such items would be consumed within the place where sold.

(4) FOOD SOLD TO STUDENTS. The exemption otherwise granted by Section 6363 does not apply to sales of food products to students when sold within, and for consumption within, a place the entrance to which is subject to an admission charge, and such sales are subject to tax except as provided in (p) of this regulation. For example, when food products are sold by a

student organization to students or to both students and nonstudents within a place the entrance to which is subject to an admission charge, such as a place where school athletic events are held, the sales to both students and nonstudents are taxable.

**(e) HOT PREPARED FOOD PRODUCTS.**

(1) GENERAL. Tax applies to all sales of hot prepared food products unless otherwise exempt. "Hot prepared food products" means those products, items, or components which have been prepared for sale in a heated condition and which are sold at any temperature which is higher than the air temperature of the room or place where they are sold. The mere heating of a food product constitutes preparation of a hot prepared food product, e.g., grilling a sandwich, dipping a sandwich bun in hot gravy, using infra-red lights, steam tables, etc. If the sale is intended to be of a hot food product, such sale is of a hot food product regardless of cooling which incidentally occurs. For example, the sale of a toasted sandwich intended to be in a heated condition when sold, such as a fried ham sandwich on toast, is a sale of a hot prepared food product even though it may have cooled due to delay. On the other hand, the sale of a toasted sandwich which is not intended to be in a heated condition when sold, such as a cold tuna sandwich on toast, is not a sale of a hot prepared food product. When a single price has been established for a combination of hot and cold food items, such as a meal or dinner which includes cold components or side items, tax applies to the entire established price regardless of itemization on the sales check. The inclusion of any hot food product in an otherwise cold combination of food products sold for a single established price, results in the tax applying to the entire established price, e.g., hot coffee served with a meal consisting of cold food products, when the coffee is included in the established price of the meal. If a single price for the combination of hot and cold food items is listed on a menu, wall sign or is otherwise advertised, a single price has been established. Except as otherwise provided in (b), (c), (d) or (f) of this regulation, or in regulation 1574, tax does not apply to the sale for a separate price of bakery goods, beverages classed as food products, or cold or frozen food products. Hot bakery goods and hot beverages such as coffee are hot prepared food products but their sale for a separate price is exempt unless taxable as provided in (b), (c), (d) or (f) of this regulation, or in Regulation 1574. Tax does apply if a hot beverage and a bakery product or cold food product are sold as a combination for a single price. Hot soup, bouillon, or consommé is a hot prepared food product which is not a beverage.

(2) AIR CARRIERS ENGAGED IN INTERSTATE OR FOREIGN COMMERCE. Tax does not apply to the sale, storage, use, or other consumption of hot prepared food products sold by caterers or other vendors to air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers, nor to the sale, storage, use, or other consumption of hot prepared food products sold or served to passengers by air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers. "Air carriers" are persons or firms in the business of transporting persons or property for hire or compensation, and include both common and contract carriers. "Passengers" do not include crew members. Any caterer or other vendor claiming the exemption must support it with an exemption certificate from the air carrier substantially in the form prescribed in Appendix A of this regulation.

**(f) FOOD FOR CONSUMPTION AT FACILITIES PROVIDED BY THE RETAILER.** Tax applies to sales of sandwiches, ice cream, and other foods sold in a form for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others.



A passenger's seat aboard a train, or a spectator's seat at a game, show, or similar event is not a "chair" within the meaning of this regulation. Accordingly, except as otherwise provided in (c), (d), and (e) above, tax does not apply to the sale of cold sandwiches, ice cream, or other food products sold by vendors passing among the passengers or spectators where the food products are not "for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer."

**(g) TIPS, GRATUITIES, AND SERVICE CHARGES.**

This subdivision applies to restaurants, hotels, caterers, boarding houses, soda fountains, drive-ins and similar establishments.

An optional payment designated as a tip, gratuity, or service charge is not subject to tax. A mandatory payment designated as a tip, gratuity, or service charge is included in taxable gross receipts, even if the amount is subsequently paid by the retailer to employees.

**(1) OPTIONAL PAYMENT.**

**(A)** A payment of a tip, gratuity, or service charge is optional if the customer adds the amount to the bill presented by the retailer, or otherwise leaves a separate amount in payment over and above the actual amount due the retailer for the sale of meals, food, and drinks that include services. The following examples illustrate transactions where a payment of a tip, gratuity or service charge is optional and not included in taxable gross receipts. This is true regardless of printed statements on menus, brochures, advertisements or other materials notifying customers that tips, gratuities, or service charges will or may be added by the retailer to the prices of meals, food, or drinks:

Example 1. The restaurant check is presented to the customer with the "tip" area blank so the customer may voluntarily write in an amount, or

Example 2. The restaurant check is presented to the customer with options computed by the retailer and presented to the customer as tip suggestions. The "tip" area is blank so the customer may voluntarily write in an amount:

*Guest Check*

Food Item A	\$9.95
Beverage Item B	3.75
Subtotal	\$13.70
8% sales tax	1.10
Subtotal	\$14.80
Tip*	
Total	

\*Suggested tips:

15%=\$2.06; 18%=\$2.47; 20%=\$2.74; other

If an employer misappropriates these payments for these charges, as discussed in subdivision (g)(1)(B) below, such payments are included in the retailer's taxable gross receipts.

(B) No employer shall collect, take, or receive any gratuity or a part thereof, paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of such gratuity, or require an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer. (Labor Code Section 351.) If this prohibition is violated, any amount of such gratuities received by the employer will be considered a part of the gross receipts of the employer and subject to the tax.

(2) MANDATORY PAYMENT.

(A) An amount negotiated between the retailer and the customer in advance of a meal, food, or drinks, or an event that includes a meal, food, or drinks is mandatory.

(B) When the menu, brochures, advertisements or other printed materials contain statements that notify customers that tips, gratuities, or service charges will or may be added, an amount automatically added by the retailer to the bill or invoice presented to and paid by the customer is a mandatory charge and subject to tax. These amounts are considered negotiated in advance as specified in subdivision (g)(2)(A). Examples of printed statements include:

"An 18% gratuity [or service charge] will be added to parties of 8 or more."

"Suggested gratuity 15%," itemized on the invoice or bill by the restaurant, hotel, caterer, boarding house, soda fountain, drive-in or similar establishment.

"A 15%voluntary gratuity will be added for parties of 8 or more."

An amount will be considered "automatically added" when the retailer adds the tip to the bill without first conferring with the customer after service of the meal and receiving approval to add the tip or without providing the customer with the option to write in the tip. Nonetheless, any amount added by the retailer is presumed to be mandatory. This presumption may be overcome as discussed in subdivision (g)(2)(C) below.

(C) It is presumed that an amount added as a tip by the retailer to the bill or invoice presented to the customer is mandatory. A statement on the bill or invoice that the amount added by the retailer is a "suggested tip," "optional gratuity," or that "the amount may be increased, decreased, or removed" by the customer does not change the mandatory nature of the charge.

This presumption may be controverted by documentary evidence showing that the customer specifically requested and authorized the gratuity be added to the amount billed.

Examples of documentary evidence that may be used to overcome the presumption include:

1. A guest check that is presented to the customer showing sales tax reimbursement and the amount upon which it was computed, without tip or with the "tip" area blank and a separate document, such as a credit card receipt, to which the retailer adds or prints the requested tip.

2. Guest receipts and payments showing that the percentage of tips paid by large groups varies from the percentage stated on the menu, brochure, advertisement or other printed materials.

3. A retailer's written policy stating that its employees shall receive confirmation from a customer before adding a tip together with additional verifiable evidence that the policy has been enforced. The policy is not in itself sufficient documentation to establish that the customer

requested and authorized that a gratuity be added to the amount billed without such additional verifiable evidence.

The retailer must retain the guest checks and any additional separate documents to show that the payment is optional. The retailer is also required to maintain other records in accordance with the requirements of Regulation 1698, *Records*.

**(h) CATERERS.**

(1) DEFINITION. The term "caterer" as used in this regulation means a person engaged in the business of serving meals, food, or drinks on the premises of the customer, or on premises supplied by the customer, including premises leased by the customer from a person other than the caterer, but does not include employees hired by the customer by the hour or day.

(2) SALES TO CATERERS. A caterer generally is considered to be the consumer of tangible personal property normally used in the furnishing and serving of meals, food or drinks, except for separately stated charges by the caterer for the lease of tangible personal property or tangible personal property regarded as being sold with meals, food or drinks such as disposable plates, napkins, utensils, glasses, cups, stemware, place mats, trays, covers and toothpicks.

(3) SALES BY CATERERS.

**(A) Caterer as Retailer.** Tax applies to the entire charge made by caterers for serving meals, food, and drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals, whether performed by the caterer, the caterer's employees or subcontractors. Tax applies to charges made by caterers for preparing and serving meals and drinks even though the food is not provided by the caterers. Tax applies to charges made by caterers for hot prepared food products as in (e) above whether or not served by the caterers. A caterer who separately states or itemizes charges for the lease of tangible personal property regardless of the use of the property will be deemed to be the lessor of such property. Tax applies in accordance with Regulation 1660 Leases of Tangible Personal Property—In General. Tax does not apply to charges made by caterers for the rental of dishes, silverware, glasses, etc., purchased by the caterer with tax paid on the purchase price if no food is provided or served by the caterers in connection with such rental.

**(B) Caterers as Lessors of Property Unrelated to the Serving or Furnishing of Meals, Food, or Drinks by a Caterer.**

1. When a caterer who is furnishing or serving meals, food, or drinks also rents or leases from a third party tangible personal property which the caterer does not use himself or herself and the property is not customarily provided or used within the catering industry in connection with the furnishing and serving of food or drinks, such as decorative props related solely to optional entertainment, special lighting for guest speakers, sound or video systems, dance floors, stages, etc., he or she is a lessor of such property. In such instance, tax applies to the lease in accordance with Regulation 1660.

2. When a person who in other instances is a caterer does not furnish or serve any meals, food, or drinks to a customer, but rents or leases from a third party tangible personal property such as dishes, linen, silverware and glasses, etc., for purposes of providing it to his or her customer, he or she is not acting as a caterer within the meaning of this regulation, but solely as

a lessor of tangible personal property. In such instances tax applies to the lease in accordance with Regulation 1660.

**(C) Caterers Planning, Designing and Coordinating Events.**

1. Tax applies to charges by a caterer for event planning, design, coordination, and/or supervision if they are made in connection with the furnishing of meals, food, or drinks for the event. Tax does not apply to separately stated charges for services unrelated to the furnishing and serving of meals, food, or drinks, such as optional entertainment or any staff who do not directly participate in the preparation, furnishing, or serving of meals, food, or drinks, e.g., coat-check clerks, parking attendants, security guards, etc.

2. When a caterer sells meals, food, or drinks, and the serving of them, to other persons such as event planners, party coordinators, or fundraisers, who buy and sell the same on their own account or for their own sake, it is a sale for resale for which the caterer may accept a resale certificate. However, a caterer may only claim the sale as a resale if the caterer obtains a resale certificate in compliance with Regulation 1668. A person is buying or selling for his or her own account, or own sake, when such person has his or her own contract with a customer to sell the meals, food, or drinks to the customer, and is not merely acting on behalf of the caterer.

3. When a caterer sells meals, food or drinks and the serving of them to other persons who charge a fee for their service unrelated to the taxable sale, the separately stated fee is not subject to tax.

**(D) Sales of Meals by Caterers to Social Clubs, Fraternal Organizations.** Sales of meals to social clubs and fraternal organizations, as those terms are defined in subdivision (i) below, by caterers are sales for resale if such social clubs and fraternal organizations are the retailers of the meals subject to tax under subdivision (i) and give valid resale certificates therefor.

**(E) Tips, Gratuities, or Service Charges.** Tips, gratuities, and service charges are discussed in subdivision (g).

(4) PREMISES. GENERAL. Separately stated charges for the lease of premises on which meals, food, or drinks are served, are nontaxable leases of real property. Where a charge for leased premises is a guarantee against a minimum purchase of meals, food or drinks, the charge for the guarantee is gross receipts subject to tax. Where a person contracts to provide both premises and meals, food or drinks, the charge for the meals, food or drinks must be reasonable in order for the charge for the premises to be non taxable.

(5) PRIVATE CHEFS. A private chef is generally not an employee of the customer, but an independent contractor who pays his or her own social security, and federal and state income taxes. Such a private chef, who prepares and serves meals, food and drinks in the home of his or her customer is a caterer under this regulation.

**(i) SOCIAL CLUBS AND FRATERNAL ORGANIZATIONS.** "Social Clubs and Fraternal Organizations" as used herein include any corporation, partnership, association or group or combination acting as a unit, such as service clubs, lodges, and community, country, and athletic clubs.

The tax applies to receipts from the furnishing of meals, food, and drink by social clubs and fraternal organizations unless furnished: (1) exclusively to members; and also, (2) less frequently than once a week. Both these requirements must be met. If the club or organization

furnishes meals, food or drink to nonmembers, all receipts from the furnishing of meals, food or drink are subject to tax whether furnished to members or nonmembers, including receipts on occasions when furnished exclusively to members. Meals, food or drink paid for by members are considered furnished to them even though consumed by guests who are not members.

**(j) STUDENT MEALS.**

**(1) DEFINITIONS.**

**(A) "Food Products."** As used herein, the term "food products" as defined in Regulation 1602 (18 CCR 1602) includes food furnished, prepared, or served for consumption at tables, chairs, or counters, or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare or serve food to others.

**(B) "Meals."** As used herein, the term "meals" includes both food and nonfood products, which are sold to students for an established single price at a time set aside for meals. If a single price for the combination of a nonfood product and a food product is listed on a menu or on a sign, a single price has been established. The term "meals" does not include nonfood products which are sold to students for a separate price and tax applies to the sales of such products. Examples of nonfood products are: carbonated beverages and beer. For the purpose of this regulation, products sold at a time designated as a "nutrition break", "recess", or similar break, will not be considered "meals".

**(2) APPLICATION OF TAX.**

**(A) Sales By Schools, School Districts and Student Organizations.** Sales of meals or food products for human consumption to students of a school by public or private schools, school districts, and student organizations, are exempt from tax, except as otherwise provided in (d)(4) above.

**(B) Sales by Parent-Teacher Associations.** Tax does not apply to the sale of, nor the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served to the students of a school by parent-teacher associations. Parent-teacher associations qualifying under Regulation 1597 as consumers are not retailers of tangible personal property, which they sell. Accordingly, tax does apply to the sale to such associations of nonfood items such as carbonated beverages, containers, straws and napkins.

**(C) Sales by Blind Vendors.** Tax does not apply to the sale of meals or food products for human consumption to students of a school by any blind person (as defined in Section 19153 of the Welfare and Institutions Code) operating a restaurant or vending stand in an educational institution under Article 5 of Chapter 6 of Part 2 of Division 10 of the Welfare and Institutions Code, except as otherwise provided in (d)(4) above.

**(D) Sales by Caterers.** The application of tax to sales by caterers in general is explained in subdivision (h) above. However, tax does not apply to the sale by caterers of meals or food products for human consumption to students of a school, if all the following criteria are met:

1. The premises used by the caterer to serve the lunches to the students are used by the school for other purposes, such as sporting events and other school activities, during the remainder of the day;

2. The fixtures and equipment used by the caterer are owned and maintained by the school; and

3. The students purchasing the meals cannot distinguish the caterer from the employees of the school.

**(k) EMPLOYEES' MEALS.**

(1) IN GENERAL. Any employer or employee organization that is in the business of selling meals, e.g., a restaurant, hotel, club, or association, must include its receipts from the sales of meals to employees, along with its receipts from sales to other purchasers of meals, in the amount upon which it computes its sales tax liability. An employer or an employee organization selling meals only to employees becomes a retailer of meals and liable for sales tax upon its receipts from sales of meals if it sells meals to an average number of five or more employees during the calendar quarter.

(2) SPECIFIC CHARGE. The tax applies only if a specific charge is made to employees for the meals. Tax does not apply to cash paid an employee in lieu of meals. A specific charge is made for meals if:

(A) Employee pays cash for meals consumed.

(B) Value of meals is deducted from employee's wages.

(C) Employee receives meals in lieu of cash to bring compensation up to legal minimum wage.

(D) Employee has the option to receive cash for meals not consumed.

(3) NO SPECIFIC CHARGE. If an employer makes no specific charge for meals consumed by employees, the employer is the consumer of the food products and the non-food products, which are furnished to the employees as a part of the meals.

In the absence of any of the conditions under (k)(2) a specific charge is not made if:

(A) A value is assigned to meals as a means of reporting the fair market value of employees' meals pursuant to state and federal laws or regulations or union contracts.

(B) Employees who do not consume available meals have no recourse on their employer for additional cash wages.

(C) Meals are generally available to employees, but the duties of certain employees exclude them from receiving the meals and are paid cash in lieu thereof.

(4) MEALS CREDITED TOWARD MINIMUM WAGE. If an employee receives meals in lieu of cash to bring his or her compensation up to the legal minimum wage, the amount by which the minimum wage exceeds the amount otherwise paid to the employee is includable in the employer's taxable gross receipts up to the value of the meals credited toward the minimum wage.

For example, if the minimum rate for an eight-hour day is \$46.00, and the employee received \$43.90 in cash, and a lunch is received which is credited toward the minimum wage in the

maximum allowable amount of \$2.10, the employer has received gross receipts in the amount of \$2.10 for the lunch.

(5) **TAX REIMBURSEMENT.** If a separately stated amount for tax reimbursement is not added to the price of meals sold to employees for which a specific charge is made, the specific charge will be regarded as being a tax-included charge for the meals.

**(f) RELIGIOUS ORGANIZATIONS.** Tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served by any religious organization at a social or other gathering conducted by it or under its auspices, if the purpose in furnishing or serving the meals and food products is to obtain revenue for the functions and activities of the organization and the revenue obtained from furnishing or serving the meals and food products is actually used in carrying on such functions and activities. For the purposes of this regulation, "religious organization" means any organization the property of which is exempt from taxation pursuant to Subdivision (f) of section 3 of Article XIII of the State Constitution.

**(m) INSTITUTIONS.** Tax does not apply to the sale of, nor the storage, use, or other consumption in this state of, meals and food products for human consumption furnished or served to and consumed by patients or residents of an "institution" as defined in Regulation 1503. Tax, however, does apply to the sale of meals and food products by an institution to persons other than patients or residents of that institution.

**(n) MEAL PROGRAMS FOR LOW-INCOME ELDERLY PERSONS.** Tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served to low-income elderly persons at or below cost by a nonprofit organization or governmental agency under a program funded by this state or the United States for such purposes.

**(o) FOOD PRODUCTS, NONALCOHOLIC BEVERAGES AND OTHER TANGIBLE PERSONAL PROPERTY TRANSFERRED BY NONPROFIT YOUTH ORGANIZATIONS.** See Regulation 1597 for application of tax on food products, nonalcoholic beverages and other tangible personal property transferred by nonprofit youth organizations.

**(p) NONPROFIT PARENT-TEACHER ASSOCIATIONS.** Nonprofit parent-teacher associations and equivalent organizations qualifying under Regulation 1597 are consumers and not retailers of tangible personal property, which they sell.

**(q) MEALS AND FOOD PRODUCTS SERVED TO CONDOMINIUM RESIDENTS.** Tax does not apply to the sale of and the storage, use, or other consumption in this state of meals and food products for human consumption furnished to and consumed by persons 62 years of age or older residing in a condominium and who own equal shares in a common kitchen facility; provided, that the meals and food products are served to such persons on a regular basis.

This exemption is applicable only to sales of meals and food products for human consumption prepared and served at the common kitchen facility of the condominium. Tax applies to sales to persons less than 62 years of age.

**(r) VETERAN'S ORGANIZATION.** Beginning April 1, 2004, tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served by any nonprofit veteran's organization at a social or other gathering conducted by it or under its auspices, if the purpose in furnishing or serving the meals

and food products is to obtain revenue for the functions and activities of the organization and the revenue obtained from furnishing or serving the meals and food products is actually used in carrying on those functions and activities.

**(s) FOOD STAMP COUPONS.** Tax does not apply to tangible personal property, which is eligible to be purchased with federal food stamp coupons acquired pursuant to the Food Stamp Act of 1977 and so purchased. When payment is made in the form of both food stamps and cash, the amount of the food stamp coupons must be applied first to tangible personal property normally subject to the tax, e.g., nonalcoholic carbonated beverages. Retailers are prohibited from adding any amount designated as sales tax, use tax, or sales tax reimbursement to sales of tangible personal property purchased with food stamp coupons. (See paragraph (c) of Regulation 1602.5 for special reporting provisions by grocers.)

**(t) HONOR SYSTEM SNACK SALES.** An "honor system snack sale" means a system where customers take snacks from a box or tray and pay by depositing money in a container provided by the seller. Snacks sold through such a system may be subject to tax depending upon where the sale takes place. Sales of such snacks are taxable when sold at or near a lunchroom, break room, or other facility that provides tables and chairs, and it is contemplated that the food sold will normally be consumed at such facilities. Honor system snack sales do not include hotel room mini-bars or snack baskets.

**(u) Mobile Food Vendors.** Mobile food vendors include retailers who sell food and beverages for immediate consumption from motorized vehicles or un-motorized carts. Examples of mobile food vendors include food trucks, coffee carts, and hot dog carts. Effective For sales made on or after July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors' sales of taxable items are presumed to be made on a tax-included basis.

This presumption does not apply when a mobile food vendor is making sales as a "caterer" as defined in (h)(1).



BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION

450 N STREET  
SACRAMENTO, CALIFORNIA

REPORTER'S TRANSCRIPT

NOVEMBER 19, 2013

BUSINESS TAXES COMMITTEE

Reported by: Juli Price Jackson

No. CSR 5214

P R E S E N T

For the Board  
of Equalization:

Betty T. Yee  
Chair

Michelle Steel  
Member

Jerome Horton  
Member

George Runner  
Member

Marcy Jo Mandel  
Appearing for John  
Chiang, State  
Controller  
(per Government Code  
Section 7.9)

Joann Richmond  
Chief, Board  
Proceedings Division

For Board Staff:

Randy Ferris  
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Susanne Buehler  
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Tax Policy Division  
Sales & Use Tax  
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Lawrence Mendel  
Tax Counsel III  
(Specialist)  
Legal Department

Cary Huxsoll  
Tax Counsel III  
(Specialist)  
Legal Department

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450 N STREET  
SACRAMENTO, CALIFORNIA  
NOVEMBER 19, 2013

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MR. HORTON: Good morning, Members and  
guests.

Let us call the meeting of the Board of  
Equalization to order.

Ms. Richmond, what is our first item?

MS. RICHMOND: Good morning, Chairman and  
Board Members.

Our first item on this morning's agenda is  
the Business Taxes Committee. Ms. Yee is the Chair  
of that committee.

Ms. Yee.

MS. YEE: Thank you very much,  
Ms. Richmond.

Good morning, Members. We have two items  
on the Business Taxes Committee agenda this morning.

The first is proposed amendment to  
Regulation 1699 relating to permits; and the second  
to proposed revisions to Regulation 1603 relating to  
the taxable sales of food products.

We will start with item 1 and have staff  
introduce the issue.

Good morning.

MS. BUEHLER: Good morning. I am Susanne  
Buehler with the Sales and Use Tax Department.

1           We have two agenda items for your  
2   consideration this morning. We will take each  
3   agenda item and their respective action item  
4   separately before moving to the next.

5           With me for agenda item No.1 is  
6   Mr. Lawrence Mendel from our Legal Department. For  
7   this agenda item we request your approval and  
8   authorization to publish proposed amendments to  
9   Sales and Use Tax Regulation 1699, Permits.

10          The proposed amendments provide  
11   clarification for Revenue and Taxation Code  
12   Section 6070.5. This section authorizes the Board  
13   of Equalization, under certain conditions, to refuse  
14   to issue or to revoke seller's permits of persons  
15   with outstanding final sales and use tax  
16   liabilities.

17          We are happy to answer any questions you  
18   may have on this topic.

19          MS. YEE: Thank you very much, Ms. Buehler.

20          Questions, Members?

21          Yes, Senator Runner.

22          MR. RUNNER: The process for  
23   reconsideration, where -- where is that done?

24          MS. BUEHLER: That will be done in the  
25   district offices.

26          MR. RUNNER: Okay. Okay, thanks.

27          MS. YEE: Okay. Thank you.

28          Other comments?

1 Mr. Horton.

2 MR. HORTON: Members, I believe staff  
3 has -- has addressed this, but I shared my concerns  
4 with our team about businesses that -- that have a  
5 financial liability with the State of California via  
6 the Board of Equalization, but yet are -- decides to  
7 open up a business that is separate and distinct  
8 from the business that they're currently operating  
9 and that they're not using any of the funds or  
10 depleting their funds relative to paying their  
11 liability. And we should not prohibit them from  
12 starting a business in the State of California when  
13 that is the case, when there is no financial -- no  
14 evidence of a financial risk to the State of  
15 California.

16 Staff has addressed that, I believe.

17 MS. BUEHLER: We have submitted language to  
18 you if you would like to use that language.

19 We believe that if someone is having an  
20 outstanding final liability and is working with the  
21 State, as in the regulation, having a proposed  
22 installment payment agreement or working with us  
23 through settlement, that they would still qualify  
24 under the regulation to have their permit.

25 So, it, I believe, addresses your issue as  
26 well, but we also sent to your office some language  
27 that you had requested.

28 MR. HORTON: That -- I mean I'm supportive

1 of that because it speaks to the executive judgment  
2 and being able to -- staff being able to make a  
3 judgment call based on their participation in the  
4 payment.

5           However, when we have a policy out there,  
6 that policy doesn't necessarily guide staff as a  
7 result of the judgment.

8           So, I think there may need to be some  
9 clarity.

10           MR. RUNNER: Do you have a copy of the  
11 language?

12           MR. HORTON: I don't. Does staff have a  
13 copy of the language?

14           MS. BUEHLER: I have a copy here. I can  
15 read, if you like?

16           MR. HORTON: Member Yee --

17           MS. YEE: Yes, please --

18           MR. HORTON: Madam Chair?

19           MS. YEE: -- if you'll do that.

20           MS. BUEHLER: "If the new business is  
21 in a different line of business than  
22 the business with the outstanding  
23 final tax liability with the Board, then  
24 the Board shall not refuse to issue the  
25 new permit.

26           "A new line of business is defined  
27 as a business with a different NAICS  
28 sector code than the business with the

1 outstanding final tax liability with the  
2 Board."

3 MR. HORTON: Members, I would add to that  
4 and allow the Board to use their executive  
5 discretion, professional discretion, add to that to  
6 say, "As long as there's a determination that there  
7 is no financial exposure to the Board."

8 But I'd like to see the language added to  
9 it.

10 MS. YEE: So, this -- Mr. Horton, your  
11 suggestion is adding the language just read by  
12 Ms. Buehler to the existing revisions --

13 MR. HORTON: Yes.

14 MS. YEE: -- or the proposed revisions  
15 before us?

16 MR. HORTON: Yes.

17 MS. YEE: So, it covers those who have  
18 outstanding final liabilities, presumably working  
19 with the Board to satisfy those through the  
20 different options.

21 And then on top of that, having the ability  
22 for us to grant a permit to an applicant that is  
23 going into a different line of business?

24 MR. HORTON: Yes, I -- I -- I agree with  
25 staff that the -- that the current language actually  
26 accomplishes that objective.

27 The concern is is that others are having --  
28 will have to read this language and make an

1 interpretation down the road. Staff will be looking  
2 at the language and so forth and so would not want  
3 to have a situation where they take the language  
4 literally in a more hard line approach.

5 And I believe that additional language  
6 provides further clarification, not only to the  
7 business community, but also to our staff that if,  
8 in fact, an entity that has a liability with the  
9 Board of Equalization seeks to open another business  
10 and they are cooperating in the payment of the bill,  
11 there -- this is not an impediment to opening and  
12 operating a business in the State of California.

13 MS. YEE: Yeah.

14 MS. MANDEL: I'm confused. I'm a little  
15 confused.

16 MS. YEE: Yeah.

17 MS. MANDEL: 'Cause I haven't seen the  
18 language.

19 MS. YEE: Yeah, we can have copies  
20 circulated.

21 But I also think that probably to  
22 accomplish what you're seeking, Mr. Horton, I am not  
23 so sure that the language is required, but -- and if  
24 it's flexibility that we want in terms of how we  
25 want staff to look at permit applicants, I'm  
26 wondering if it makes sense just to be silent about  
27 it, but -- and then have a separate, you know, kind  
28 of outreach component to, obviously, let that be



1 known.

2 But I see Mr. Ferris at the table and let's  
3 hear from him.

4 MR. FERRIS: Yes. I'm just wondering if  
5 perhaps the audit manual might be the place in order  
6 to spell that out clearly.

7 'Cause if you want to preserve discretion  
8 to use --

9 MR. HORTON: I would agree with that.

10 But CCPM compliant?

11 MR. FERRIS: Right.

12 MS. BUEHLER: Yes.

13 MR. FERRIS: Yes.

14 MR. HORTON: I'd agree with that.

15 MS. YEE: Okay. Ms. Mandel, do you --

16 MS. MANDEL: Well, okay.

17 MR. HORTON: Maybe you can provide the  
18 Members with a copy of the language, Ms. Buehler.

19 MS. BUEHLER: Certainly.

20 MR. HORTON: That might be helpful to  
21 Ms. Mandel.

22 MS. MANDEL: Thank you. I'm like a paper  
23 person, I hear the words, but I'm not sure how it --  
24 where it fits or how it fits.

25 And both -- the new statute, it gave us the  
26 authority, right, it's permissive?

27 MS. BUEHLER: Right.

28 MS. MANDEL: So that now we can do

1 something we couldn't do before when people were  
2 sort of churning businesses, right?

3 MS. BUEHLER: Correct.

4 MS. MANDEL: And -- and the way the  
5 regulation -- the proposal before us, it's -- it  
6 picks that up, right?

7 MS. BUEHLER: Yes.

8 MS. MANDEL: I kind of -- it's hard for me  
9 to get what the suggested new language is doing.

10 MR. RUNNER: Just -- can I just --  
11 clarification on the language -- on the intent?

12 The intent is -- I mean, what you have is  
13 somebody who has a final determination?

14 MS. BUEHLER: Correct.

15 MR. RUNNER: And what we're saying is if  
16 you have a final determination and you go to start a  
17 new business, that we -- we will permit you -- we  
18 will -- we have the ability -- we will go ahead and  
19 issue a new permit if there is agreement in regards  
20 to a payment process, something that's in place  
21 there?

22 Is that -- is that basically the --

23 MS. BUEHLER: Yes.

24 MR. RUNNER: -- the bottom line for that?

25 MS. BUEHLER: Yes.

26 MR. RUNNER: And I guess that's what I'm  
27 trying to -- in terms of the language, Mr. Chair,  
28 that you're looking for, is that also your

1 understanding is that there needs to be a -- that  
2 there needs to be an agreement in regards to a  
3 payment plan or schedule or something like that?

4 'Cause -- just -- 'cause it sounded to me,  
5 again, like the language I heard was, hey, if -- you  
6 are, if you're -- if you're a used car dealer and  
7 you've got a final determination and you want to go  
8 and open up a mini-market, we will let you do that,  
9 even if we have a final determination.

10 MR. HORTON: No.

11 MR. RUNNER: It's not your intent?

12 MR. HORTON: Not at all.

13 The -- the language is more for -- to  
14 provide additional clarification that -- well, what  
15 might be helpful, Madam Chair -- if I may?

16 MS. YEE: Yes.

17 MR. HORTON: Is to have staff just sort of  
18 explain the challenge before the Board of  
19 Equalization and why the language is before us.

20 And -- and then the permissive nature of  
21 it, because -- I mean, as I said earlier, I think  
22 the existing language is sufficient.

23 The concern is in -- is when a business  
24 person reads this language or staff reads this  
25 language and because of its permissive nature now  
26 the decision is in the hands of our compliance team  
27 members and so forth as to the degree of the  
28 participation.

1 I don't know that the language specific  
2 that that --

3 MR. MENDEL: I believe if you are in a  
4 payment plan, either an approved payment plan or  
5 through OIC, it defines that as not having a final  
6 liability.

7 It's not permissive for staff to ignore a  
8 payment plan that's in place.

9 MR. HORTON: So, when you're in a payment  
10 plan, there is no final liability?

11 MS. BUEHLER: No, it's still a final  
12 liability.

13 MR. MENDEL: But --

14 MR. HORTON: I think it is.

15 MR. MENDEL: -- but I don't think it's  
16 permissive --

17 MR. HORTON: Maybe you guys want to  
18 consult --

19 MS. BUEHLER: Yeah, it's not permissive --

20 MR. HORTON: -- each other?

21 MR. MENDEL: Yes.

22 MS. BUEHLER: -- with respect to the  
23 regulation and the statute.

24 MS. YEE: Right.

25 MR. HORTON: Okay. I wasn't -- I wasn't  
26 clear what the conclusion was.

27 MR. MENDEL: It's not -- staff isn't  
28 permitted to ignore a payment plan.

1 MS. MANDEL: They will -- they will get a  
2 new seller's permit, if --

3 MR. RUNNER: They will --

4 MS. MANDEL: -- they're already paying?

5 MR. RUNNER: -- they will issue the permit?

6 MR. MENDEL: Yes.

7 MS. MANDEL: And if they're in -- if  
8 they're pursuing settlement?

9 MS. BUEHLER: Then they still will get  
10 their permit.

11 MS. MANDEL: They will get -- okay.

12 MR. RUNNER: Again it seems to me --

13 MR. HORTON: Okay, all right.

14 MR. RUNNER: -- the focus on this is  
15 somebody who has a final determination, they have  
16 no -- they have provided no communication or plan as  
17 to how they want to go ahead and -- and pay that  
18 liability.

19 And then they come in and say, "Now I want  
20 another permit to open up business X."?

21 MS. BUEHLER: Right.

22 MR. RUNNER: That's the focus that we're  
23 trying to get?

24 MS. BUEHLER: Right.

25 MR. RUNNER: Okay.

26 MR. HORTON: Right.

27 MS. MANDEL: And, so, this -- this language  
28 that you just handed us, though, looks like it's a

1 whole separate thing.

2 That in Mr. Runner's example of a car  
3 dealer who then wants to open a mini-mart, if that  
4 guy, when he was a car dealer had a final liability  
5 and he hasn't gone into the settlement program, he's  
6 not trying to do an offer or something, this  
7 language just on its face, 'cause I don't know where  
8 it goes --

9 MR. HORTON: Tell you what might --

10 MS. YEE: Yes, this --

11 MR. HORTON: -- Member Mandel, what  
12 might -- might help me a little bit, I think Randy's  
13 recommendation will get me there.

14 And I think we can probably even go as far  
15 as to provide a specific example for guidance to  
16 give staff the additional guidance.

17 I would just not want to -- to  
18 subsequently, unintentionally on the part of our  
19 team members, have a situation where the taxpayer's  
20 denied the -- the opportunity to open a business  
21 because for some reason, whatever reason, there was  
22 a misunderstanding between staff.

23 So, if we can come up with an example that  
24 brings clarity to the -- that businesses will not be  
25 denied a penalty -- I mean, denied an opportunity to  
26 open a business if, in fact, they are cooperating  
27 with us.

28 The concern is when a business is operating

1 in a particular industry and they use this strategy  
2 as way to avoid their liability and yet continue to  
3 operate in the same line of business.

4 And typically those who are opening up  
5 another line of business, they're not the  
6 perpetrators of this problem that we face and that  
7 we seek to resolve.

8 And, so, I would want to somehow make it  
9 clear that they're not the target.

10 MS. YEE: Okay. Thank you, Mr. Horton.

11 So, why don't we do this, let's go back to  
12 the proposed revisions before us with respect to  
13 Regulation 1699. And it is to essentially clarify  
14 what was enacted by Assembly bills 1307, relative to  
15 the circumstances by which we can avoid permits  
16 being denied, and that is for our -- anyone with an  
17 outstanding liability to enter into an installment  
18 payment plan or an offer and compromise.

19 So, those are the revisions that the  
20 regulation proposes to include. And we will then  
21 look separately -- have staff bring back to us a  
22 proposed -- a possible proposed change to the  
23 Compliance Manual with respect to the issue about --  
24 that's related to this language that was just handed  
25 out.

26 Does that make sense?

27 MR. HORTON: That works.

28 MS. YEE: Okay, very well.

1 Other comments with respect to the proposed  
2 revisions?

3 Hearing none, is there a motion?

4 MR. HORTON: Move adoption of staff  
5 recommendation.

6 MS. YEE: Motion by Mr. Horton to adopt the  
7 proposed revisions to Regulation 1699.

8 Is there a second?

9 MS. MANDEL: Second.

10 MS. YEE: Second by Ms. Mandel.

11 Without objection, that motion carries.  
12 Thank you -- thank you.

13 Next item is proposed revisions to  
14 Regulation 1603, taxable sales of food products.

15 MS. BUEHLER: For agenda item 2, Mr. Cary  
16 Huxsoll from our Legal Department will be joining  
17 me.

18 For this agenda item we request your  
19 approval and authorization to publish proposed  
20 amendments to Sales and Use Tax Regulation 1603,  
21 taxable sales of food products.

22 The proposed amendments provide that unless  
23 a separate amount of tax reimbursement is added to  
24 the sales price, mobile food vendors sales of  
25 taxable items are presumed to be made on a tax  
26 included basis.

27 The presumptions would not apply when a  
28 mobile food vendor is making sales as a caterer.



1           We are happy to answer any questions you  
2 may have on this topic.

3           MS. YEE: Thank you, Ms. Buehler.

4           Yes, Senator Runner and then Ms. Steel.

5           MR. RUNNER: What -- what is our plan for  
6 outreach for this?

7           I mean, do we have -- do we feel like we  
8 have a good handle on who to contact and how to  
9 update individual businesses on this particular  
10 change?

11          MS. BUEHLER: We do have the addresses of  
12 several associations. We plan to outreach to them,  
13 as well as contacting those folks who are coded as  
14 caterer, catering trucks in our mainframe system.  
15 They will also be receiving outreach.

16          We will also be including information on  
17 our industry-specific web pages regarding these  
18 changes.

19          MR. RUNNER: How -- how successful -- I  
20 assume that we did some interested parties  
21 discussions in this -- how successful were we in  
22 getting them to engage during that time?

23          MS. BUEHLER: We've had very limited  
24 engagement from the associations and no, of the  
25 actual taxpayers coming to meetings.

26          MR. RUNNER: I mean I think I understand  
27 it's something we need to do. But, boy, I'll tell  
28 you the challenge we have is that is such a loosely

1 organized business model out there.

2 MS. BUEHLER: Uh-huh.

3 MR. RUNNER: And I think -- I think again  
4 we can contact the associations, but I'm afraid  
5 that, just like the invitation to join in an  
6 interested parties wasn't very successful, I'm  
7 afraid --

8 MS. BUEHLER: Right.

9 MR. RUNNER: -- that that will be the case  
10 with this too.

11 So, I just think we have to be very  
12 creative in terms of maybe overcommunicating how  
13 we're going to deal with this issue.

14 You know, whether it's focused on --  
15 certain, you know, areas -- ethnic groups,  
16 whatever -- where we feel like we can communicate  
17 clearly for folks that are -- tend to be in these  
18 kind of businesses, I think we need to figure out  
19 how to do that.

20 MS. BUEHLER: Yeah, we will be working with  
21 our Outreach Section to be able to glean whatever  
22 they have from their events and their contacts as  
23 well.

24 MR. RUNNER: Thanks.

25 MS. YEE: Thank you. Well-placed concern,  
26 Senator Runner.

27 Ms. Steel.

28 MS. STEEL: I think it -- we reach out to

1 the catering houses, that's going to help too.

2 And I really appreciate that Chairman --  
3 Chairwoman Yee and then, you know, staff working on  
4 this because I saw so many cases in Orange County  
5 and I think San Francisco, your district too.

6 And I think, you know, this is -- really  
7 our regulation has finally caught up with this kind  
8 of business practice. And I'm really, really happy  
9 to see this report and, you know, moving forward.

10 Because, you know, the short time they  
11 tried to sell -- you know, try to -- you know,  
12 separate from the sales price with the sales taxes,  
13 it's really, really hard. And then they're not even  
14 having register, they're trying to write it down  
15 each, you know, tax receipts, it was very, very  
16 tough.

17 And it's tough too BOE to follow up too  
18 because, you know, what's taxable and what's not and  
19 you know, what -- how much. And it was very, very  
20 tough to follow up.

21 So, this regulation is really, really good.  
22 And thank you very much for the staff and thank you  
23 for initiating this.

24 Thank you.

25 MS. YEE: Thank you, Ms. Steel.

26 Other comments, Members?

27 Mr. Horton.

28 MR. HORTON: Thank you as well, Member Yee,

1 for your work in this.

2 I too have several catering trucks in my  
3 district that experienced similar challenges. And I  
4 concur that there is quite a bit of synergy with the  
5 catering houses.

6 When we sought to implement the 6015  
7 retailer and working through the catering house,  
8 which still exists, might be a means to -- they  
9 might have a vested interest in making sure that  
10 the -- pursuant to 6015 retail -- that there is a  
11 level of compliance in the industry.

12 As we reach out in the outreach and  
13 education, I would encourage us to include  
14 discussions about excess tax reimbursement, given --  
15 and the fact that is this a rebuttable presumption,  
16 so that it's not taken as a hard line rule, which --  
17 which is part of, I think, the problem or the  
18 challenge that got us here is that there were a  
19 number of professionals who were providing  
20 accounting services for the -- this industry that  
21 basically told them all they had to report is 150,  
22 \$160 a day and that they were following those  
23 individuals' lead.

24 Member Steel conducted a very, very  
25 extensive seminar and outreach in Orange County,  
26 which I was fortunate to participate in the first  
27 one. And quite to our surprise, they thought they  
28 were doing it right because of a previous rebuttable

1 presumption that was created by someone other than  
2 the Board of Equalization.

3 Thank you.

4 MS. YEE: Thank you, Mr. Horton.

5 Other comments, Members?

6 Let me me also thank the staff for the work  
7 in this area. And I just want to echo Senator  
8 Runner's sentiments.

9 As we know, the food truck industry, which  
10 is really picking up in different parts of the  
11 State, really operate at various degrees of  
12 sophistication.

13 And I do think that, on the one hand, we  
14 are facilitating, certainly, the on the ground  
15 transactions that these vendors are making; on the  
16 other hand, when it comes to reporting and complying  
17 with their tax requirements, it is something that --  
18 I think what we have seen lacking is really robust  
19 recordkeeping and, obviously, being sure that they  
20 understand that when we do have them operate on a  
21 tax included basis that there are -- really there is  
22 really more of a responsibility for these vendors in  
23 terms of they then will submit their returns.

24 So, the outreach, I hope, will be very  
25 focused on recordkeeping. And it may be that we  
26 will need to think about some flexible ways for some  
27 of these vendors to keep their records, certainly  
28 with a focus on the fact that we have many of our

1 ethnic communities that are operating these -- that  
2 are vendors in this particular area.

3 And as well as hopefully having our SCOP  
4 team really play a more enhanced role as they're out  
5 and about in their respective areas to really do  
6 more than just looking for a permit, but, hopefully,  
7 be able to be part of the education about --  
8 particularly the areas of recordkeeping, which is  
9 where oftentimes the cases we hear are so -- it's  
10 disappointing when we have to rule against a  
11 taxpayer because of that. But that -- that  
12 is really the crux of all of the problems.

13 Okay, very well. Other questions and  
14 comments?

15 May I just make a request also?

16 Ms. Buehler, if you would work with the Outreach  
17 Division and perhaps come back with an outreach  
18 plan, I'm sure all of us, because of our experience  
19 in our districts, may have some suggestions for  
20 components --

21 MS. BUEHLER: Okay.

22 MS. YEE: -- of that plan.

23 MS. STEEL: Yes.

24 MS. YEE: And I think also as we look at  
25 continuing to do our classes and outreach seminars  
26 that we -- this may actually help shore up our  
27 capacity in terms of our end language capabilities  
28 going forward, starting with this industry and

1 certainly I think will be beneficial to other  
2 industries as well.

3 Okay, very well. Hearing no other comments  
4 or questions, is there a motion?

5 MR. HORTON: So moved.

6 MS. STEEL: So moved.

7 MS. YEE: Motion by Mr. Horton to adopt the  
8 proposed revisions to Regulation 1603, seconded by  
9 Member Steel.

10 Without objection, the revisions are  
11 adopted.

12 Thank you very much.

13 MS. BUEHLER: Thank you.

14 MS. YEE: This adjourns the Business Taxes  
15 Committee, thank you.

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## 1 REPORTER'S CERTIFICATE.

2  
3 State of California )  
4 ) ss  
5 County of Sacramento )  
6

7 I, JULI PRICE JACKSON, Hearing Reporter for  
8 the California State Board of Equalization certify  
9 that on NOVEMBER 19, 2013 I recorded verbatim, in  
10 shorthand, to the best of my ability, the  
11 proceedings in the above-entitled hearing; that I  
12 transcribed the shorthand writing into typewriting;  
13 and that the preceding pages 1 through 23 constitute  
14 a complete and accurate transcription of the  
15 shorthand writing.  
16

17 Dated: February 3, 2014  
18

19  
20 

21 JULI PRICE JACKSON

22 Hearing Reporter  
23  
24  
25  
26  
27  
28





**ESTIMATE OF COST OR SAVINGS RESULTING  
FROM PROPOSED REGULATORY ACTION**

**Proposed Amendment of Sales and Use Tax Regulation 1603, *Taxable Sales of Food Products***

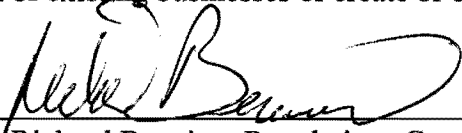
**STATEMENT OF COST OR SAVINGS FOR NOTICE OF PUBLIC HEARING**


The State Board of Equalization has determined that the proposed action does not impose a mandate on local agencies or school districts. Further, the Board has determined that the action will result in no direct or indirect cost or savings to any State agency, any local agency or school district that is required to be reimbursed under Part 7 (commencing with Section 17500) of Division 4 of Title 2 of the Government Code or other non-discretionary cost or savings imposed on local agencies, or cost or savings in Federal funding to the State of California.

The cost impact on private persons or businesses will be insignificant. This proposal will not have a significant adverse economic impact on businesses.

This proposal will not be detrimental to California businesses in competing with businesses in other states.

This proposal will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses or create or expand business in the State of California.

Statement  
Prepared by  Date 1-23-14  
Richard Bennion, Regulations Coordinator

Approved by  Date 1/24/14  
Randy Ferris, Chief Counsel

**If Costs or Savings are Identified, Signatures of Chief, Fiscal Management Division, and Chief, Board Proceedings Division, are Required**

Approved by \_\_\_\_\_ Date \_\_\_\_\_  
Chief, Financial Management Division

Approved by \_\_\_\_\_ Date \_\_\_\_\_  
Chief, Board Proceedings Division

**NOTE: SAM Section 6615 requires that estimates resulting in cost or savings be submitted for Department of Finance concurrence before the notice of proposed regulatory action is released.**

**ECONOMIC AND FISCAL IMPACT STATEMENT  
(REGULATIONS AND ORDERS)**

STD. 399 (REV. 12/2013)

**ECONOMIC IMPACT STATEMENT**

DEPARTMENT NAME The Board of Equalization	CONTACT PERSON Richard E. Bennion	EMAIL ADDRESS rbennion@boe.ca.gov	TELEPHONE NUMBER 916-445-2130
DESCRIPTIVE TITLE FROM NOTICE REGISTER OR FORM 400 Title 18, Section 1603, Taxable Sales of Food Products			NOTICE FILE NUMBER Z

**A. ESTIMATED PRIVATE SECTOR COST IMPACTS** *Include calculations and assumptions in the rulemaking record.*

1. Check the appropriate box(es) below to indicate whether this regulation:

- ☐ a. Impacts business and/or employees
 ☐ e. Imposes reporting requirements  
☐ b. Impacts small businesses
 ☐ f. Imposes prescriptive instead of performance  
☐ c. Impacts jobs or occupations
 ☐ g. Impacts individuals  
☐ d. Impacts California competitiveness
 ☒ h. None of the above (Explain below):

Please see the attached.

***If any box in Items 1 a through g is checked, complete this Economic Impact Statement.******If box in Item 1.h. is checked, complete the Fiscal Impact Statement as appropriate.***2. The \_\_\_\_\_ estimates that the economic impact of this regulation (which includes the fiscal impact) is:  
(Agency/Department)

- ☐ Below \$10 million  
☐ Between \$10 and \$25 million  
☐ Between \$25 and \$50 million  
☐ Over \$50 million [If the economic impact is over \$50 million, agencies are required to submit a Standardized Regulatory Impact Assessment as specified in Government Code Section 11346.3(c)]

3. Enter the total number of businesses impacted: \_\_\_\_\_

Describe the types of businesses (Include nonprofits): \_\_\_\_\_

Enter the number or percentage of total  
businesses impacted that are small businesses: \_\_\_\_\_

4. Enter the number of businesses that will be created: \_\_\_\_\_ eliminated: \_\_\_\_\_

Explain: \_\_\_\_\_

5. Indicate the geographic extent of impacts: ☐ Statewide  
☐ Local or regional (List areas): \_\_\_\_\_

6. Enter the number of jobs created: \_\_\_\_\_ and eliminated: \_\_\_\_\_

Describe the types of jobs or occupations impacted: \_\_\_\_\_

7. Will the regulation affect the ability of California businesses to compete with  
other states by making it more costly to produce goods or services here? ☐ YES ☐ NO

If YES, explain briefly: \_\_\_\_\_

**ECONOMIC AND FISCAL IMPACT STATEMENT  
(REGULATIONS AND ORDERS)**

STD. 399 (REV. 12/2013)

**ECONOMIC IMPACT STATEMENT (CONTINUED)****B. ESTIMATED COSTS** *Include calculations and assumptions in the rulemaking record.*

1. What are the total statewide dollar costs that businesses and individuals may incur to comply with this regulation over its lifetime? \$ \_\_\_\_\_
  - a. Initial costs for a small business: \$ \_\_\_\_\_ Annual ongoing costs: \$ \_\_\_\_\_ Years: \_\_\_\_\_
  - b. Initial costs for a typical business: \$ \_\_\_\_\_ Annual ongoing costs: \$ \_\_\_\_\_ Years: \_\_\_\_\_
  - c. Initial costs for an individual: \$ \_\_\_\_\_ Annual ongoing costs: \$ \_\_\_\_\_ Years: \_\_\_\_\_
  - d. Describe other economic costs that may occur: \_\_\_\_\_
2. If multiple industries are impacted, enter the share of total costs for each industry: \_\_\_\_\_
3. If the regulation imposes reporting requirements, enter the annual costs a typical business may incur to comply with these requirements. *Include the dollar costs to do programming, record keeping, reporting, and other paperwork, whether or not the paperwork must be submitted.* \$ \_\_\_\_\_
4. Will this regulation directly impact housing costs? ☐ YES ☐ NO  
 If YES, enter the annual dollar cost per housing unit: \$ \_\_\_\_\_  
 Number of units: \_\_\_\_\_
5. Are there comparable Federal regulations? ☐ YES ☐ NO  
 Explain the need for State regulation given the existence or absence of Federal regulations: \_\_\_\_\_  
 Enter any additional costs to businesses and/or individuals that may be due to State - Federal differences: \$ \_\_\_\_\_

**C. ESTIMATED BENEFITS** *Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.*

1. Briefly summarize the benefits of the regulation, which may include among others, the health and welfare of California residents, worker safety and the State's environment: \_\_\_\_\_
2. Are the benefits the result of: ☐ specific statutory requirements, or ☐ goals developed by the agency based on broad statutory authority?  
 Explain: \_\_\_\_\_
3. What are the total statewide benefits from this regulation over its lifetime? \$ \_\_\_\_\_
4. Briefly describe any expansion of businesses currently doing business within the State of California that would result from this regulation: \_\_\_\_\_

**D. ALTERNATIVES TO THE REGULATION** *Include calculations and assumptions in the rulemaking record. Estimation of the dollar value of benefits is not specifically required by rulemaking law, but encouraged.*

1. List alternatives considered and describe them below. If no alternatives were considered, explain why not: \_\_\_\_\_

**ECONOMIC AND FISCAL IMPACT STATEMENT  
(REGULATIONS AND ORDERS)**

STD. 399 (REV. 12/2013)

**ECONOMIC IMPACT STATEMENT (CONTINUED)**

Summarize the total statewide costs and benefits from this regulation and each alternative considered:

Regulation: Benefit: \$ \_\_\_\_\_ Cost: \$ \_\_\_\_\_

Alternative 1: Benefit: \$ \_\_\_\_\_ Cost: \$ \_\_\_\_\_

Alternative 2: Benefit: \$ \_\_\_\_\_ Cost: \$ \_\_\_\_\_

3. Briefly discuss any quantification issues that are relevant to a comparison of estimated costs and benefits for this regulation or alternatives: \_\_\_\_\_

4. Rulemaking law requires agencies to consider performance standards as an alternative, if a regulation mandates the use of specific technologies or equipment, or prescribes specific actions or procedures. Were performance standards considered to lower compliance costs? ☐ YES ☐ NO

Explain: \_\_\_\_\_

**E. MAJOR REGULATIONS** *Include calculations and assumptions in the rulemaking record.*

***California Environmental Protection Agency (Cal/EPA) boards, offices and departments are required to submit the following (per Health and Safety Code section 57005). Otherwise, skip to E4.***

1. Will the estimated costs of this regulation to California business enterprises **exceed \$10 million**? ☐ YES ☐ NO

***If YES, complete E2. and E3***

***If NO, skip to E4***

Briefly describe each alternative, or combination of alternatives, for which a cost-effectiveness analysis was performed:

Alternative 1: \_\_\_\_\_

Alternative 2: \_\_\_\_\_

(Attach additional pages for other alternatives)

3. For the regulation, and each alternative just described, enter the estimated total cost and overall cost-effectiveness ratio:

Regulation: Total Cost \$ \_\_\_\_\_ Cost-effectiveness ratio: \$ \_\_\_\_\_

Alternative 1: Total Cost \$ \_\_\_\_\_ Cost-effectiveness ratio: \$ \_\_\_\_\_

Alternative 2: Total Cost \$ \_\_\_\_\_ Cost-effectiveness ratio: \$ \_\_\_\_\_

4. Will the regulation subject to OAL review have an estimated economic impact to business enterprises and individuals located in or doing business in California exceeding \$50 million in any 12-month period between the date the major regulation is estimated to be filed with the Secretary of State through 12 months after the major regulation is estimated to be fully implemented?

☐ YES ☐ NO

***If YES, agencies are required to submit a Standardized Regulatory Impact Assessment (SRIA) as specified in Government Code Section 11346.3(c) and to include the SRIA in the Initial Statement of Reasons.***

5. Briefly describe the following:

The increase or decrease of investment in the State: \_\_\_\_\_

The incentive for innovation in products, materials or processes: \_\_\_\_\_

The benefits of the regulations, including, but not limited to, benefits to the health, safety, and welfare of California residents, worker safety, and the state's environment and quality of life, among any other benefits identified by the agency: \_\_\_\_\_

**ECONOMIC AND FISCAL IMPACT STATEMENT  
(REGULATIONS AND ORDERS)**

STD 399 (REV 12/2013)

**FISCAL IMPACT STATEMENT****A. FISCAL EFFECT ON LOCAL GOVERNMENT** *Indicate appropriate boxes 1 through 6 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.*

- ☐ 1. Additional expenditures in the current State Fiscal Year which are reimbursable by the State. (Approximate)  
(Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

\$ \_\_\_\_\_

- ☐ a. Funding provided in \_\_\_\_\_  
Budget Act of \_\_\_\_\_ or Chapter \_\_\_\_\_, Statutes of \_\_\_\_\_

- ☐ b. Funding will be requested in the Governor's Budget Act of \_\_\_\_\_  
Fiscal Year: \_\_\_\_\_

- ☐ 2. Additional expenditures in the current State Fiscal Year which are NOT reimbursable by the State. (Approximate)  
(Pursuant to Section 6 of Article XIII B of the California Constitution and Sections 17500 et seq. of the Government Code).

\$ \_\_\_\_\_

*Check reason(s) this regulation is not reimbursable and provide the appropriate information:*

- ☐ a. Implements the Federal mandate contained in \_\_\_\_\_
- ☐ b. Implements the court mandate set forth by the \_\_\_\_\_ Court.

Case of: \_\_\_\_\_ vs. \_\_\_\_\_

- ☐ c. Implements a mandate of the people of this State expressed in their approval of Proposition No. \_\_\_\_\_

Date of Election: \_\_\_\_\_

- ☐ d. Issued only in response to a specific request from affected local entity(s).

Local entity(s) affected: \_\_\_\_\_

- ☐ e. Will be fully financed from the fees, revenue, etc. from: \_\_\_\_\_

Authorized by Section: \_\_\_\_\_ of the \_\_\_\_\_ Code;

- ☐ f. Provides for savings to each affected unit of local government which will, at a minimum, offset any additional costs to each;

- ☐ g. Creates, eliminates, or changes the penalty for a new crime or infraction contained in \_\_\_\_\_

- ☐ 3. Annual Savings. (approximate)

\$ \_\_\_\_\_

- ☐ 4. No additional costs or savings. This regulation makes only technical, non-substantive or clarifying changes to current law regulations.

- ☒ 5. No fiscal impact exists. This regulation does not affect any local entity or program.

- ☐ 6. Other. Explain \_\_\_\_\_

**ECONOMIC AND FISCAL IMPACT STATEMENT  
(REGULATIONS AND ORDERS)**

STD. 399 (REV. 12/2013)

**FISCAL IMPACT STATEMENT (CONTINUED)**

**FISCAL EFFECT ON STATE GOVERNMENT** Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.

☐ 1. Additional expenditures in the current State Fiscal Year. (Approximate)

\$ \_\_\_\_\_

It is anticipated that State agencies will:

☐ a. Absorb these additional costs within their existing budgets and resources.

☐ b. Increase the currently authorized budget level for the \_\_\_\_\_ Fiscal Year

☐ 2. Savings in the current State Fiscal Year. (Approximate)

\$ \_\_\_\_\_

☒ 3. No fiscal impact exists. This regulation does not affect any State agency or program.

☐ 4. Other. Explain \_\_\_\_\_

**C. FISCAL EFFECT ON FEDERAL FUNDING OF STATE PROGRAMS** Indicate appropriate boxes 1 through 4 and attach calculations and assumptions of fiscal impact for the current year and two subsequent Fiscal Years.

☐ 1. Additional expenditures in the current State Fiscal Year. (Approximate)

\$ \_\_\_\_\_

☐ 2. Savings in the current State Fiscal Year. (Approximate)

\$ \_\_\_\_\_

☒ 3. No fiscal impact exists. This regulation does not affect any federally funded State agency or program.

☐ 4. Other. Explain \_\_\_\_\_

FISCAL OFFICER SIGNATURE



DATE

January, 28 2014

The signature attests that the agency has completed the STD. 399 according to the instructions in SAM sections 6601-6616, and understands the impacts of the proposed rulemaking. State boards, offices, or departments not under an Agency Secretary must have the form signed by the highest ranking official in the organization.

AGENCY SECRETARY



DATE

January, 28 2014

Once approval and signature is required when SAM sections 6601-6616 require completion of Fiscal Impact Statement in the STD. 399.

DEPARTMENT OF FINANCE PROGRAM BUDGET MANAGER

DATE

☒ Exempt under SAM section 6615

**Attachment to Economic and Fiscal Impact**  
**Statement (STD. 399 (Rev. 12/2008)) for the Proposed Amendments to**  
**California Code of Regulations, Title 18, Section 1603,**  
***Taxable Sale of Food Products***

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (Rev. & Tax. Code, § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (Rev. & Tax. Code, §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers.

Civil Code section 1656.1 provides that whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. Under Civil Code section 1656.1, it shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property if the retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

In addition, sales tax reimbursement may be added to the sales price of tangible personal property in two ways. The sales tax reimbursement may be shown as a separately stated amount added to the stated sales price of the tangible personal property or the sales tax reimbursement may be included in the total lump-sum price charged for tangible personal property. Therefore, California Code of Regulations, title 18, section (Regulation) 1700 contains a general presumption that taxable tangible personal property is sold at a price which includes tax reimbursement if the retailer posts a specified sign to that effect.

Prior to 2001, Regulation 1574, *Vending Machine Operators*, also specifically provided that sales made through vending machines would be regarded as having been made on a tax-included basis if the vending machine operator posted a sign on or near the vending machine providing that "[a]ll prices of taxable items include sales tax reimbursement . . . ." As relevant here, in 2001, Regulation 1574 was amended to provide that sales of tangible personal property through vending machines are presumed to be made on a tax-included basis notwithstanding the fact that the signage discussed in Civil Code section 1656.1 is not present. The amendments were based on the nature of the vending machine industry and the expectation from customers purchasing items through vending machines that all taxable sales are made on a tax-included basis.

Mobile food vendors who sell food for immediate consumption from motorized vehicles, such as food trucks, or un-motorized carts, such as hot dog carts, do not generally have point of sale systems to calculate tax on individual transactions. Additionally, they often make sales in multiple tax districts in a given day and, as a result, their sales are often subject to varying tax rates. Therefore, similar to vending machine operators, whose sales are discussed in Regulation 1574, it is common practice in the mobile food industry for mobile food vendors to make sales on a tax-included basis. It is common practice in the mobile food industry for mobile food vendors to round their tax included prices to the nearest quarter or dollar. And, similar to the retailers and customers in the vending machine industry, mobile food vendors intend that the

prices charged for the meals that they sell to include all applicable taxes and the customers expect that amounts for sales tax reimbursement are included in the prices charged by the mobile food vendors.

While the mobile food vending industry practice is for mobile food vendors to include tax reimbursement in the prices of taxable items they sell, during recent audits, many mobile food vendors did not have a sign posted stating that tax reimbursement was included in their menu prices.

The proposed amendments to Regulation 1603 will generally describe “mobile food vendors” and add a presumption that sales made by such mobile food vendors, on or after July 1, 2014, are on a tax-included basis, regardless of whether a sign is posted stating that tax reimbursement was included in their menu prices. The presumption does not apply when a separate amount for tax reimbursement is added to the price by the mobile food vendor or when the mobile food vendor is making sales as a “caterer” as defined in subdivision (h)(1) of Regulation 1603.

The proposed amendments are intended to make Regulation 1603 consistent with the mobile food vending industry’s practice, which is to include tax reimbursement in menu prices. There is nothing in the proposed amendments to Regulation 1603 that would significantly change how mobile food vendors and their customers would generally behave in the absence of the proposed amendments. And, there is nothing in the proposed amendment to Regulation 1603 that would impact sales and use tax revenue.

In addition, the amendments to Regulation 1603 do not require any further action by mobile food vendors or their customers in order for the presumption to apply, and the proposed amendments permit, but do not require mobile food vendors to rebut the presumption by adding a separate amount for sales tax reimbursement to the sale price of the items they sale.

Furthermore, the Board anticipates that the proposed amendments to Regulation 1603 will promote fairness and benefit taxpayers, Board staff, and the Board by providing regulatory provisions consistent with industry practice and the understanding of mobile food vendors and their customers that mobile food vendors’ sales are made on a tax-included basis.

Therefore, based upon the foregoing information and all of the information in the rulemaking file, the Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed regulatory action, and the Board has determined that the proposed amendments to Regulation 1603:

- Will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states;
- Will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California;
- Will not have a significant effect on housing costs;



- Will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California; and
- Will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

The Board has also determined that the proposed amendments to Regulation 1603 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, because the Board has estimated that the proposed amendments will not have an economic impact on California business enterprises and individuals in an amount exceeding fifty million dollars (\$50,000,000) during any 12-month period.

Finally, Regulation 1603 does not regulate the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has also determined that the adoption of the proposed amendments to Regulation 1603 will not affect the benefits of Regulation 1603 to the health and welfare of California residents, worker safety, or the state's environment.

## NOTICE PUBLICATION/REGULATIONS SUBMISSION

(See instructions on  
reverse)

For use by Secretary of State only

STD. 400 (REV. 01-2013)

OAL FILE NUMBERS	NOTICE FILE NUMBER <b>Z-2014-0128-01</b>	REGULATORY ACTION NUMBER	EMERGENCY NUMBER
For use by Office of Administrative Law (OAL) only			
<b>RECEIVED FOR FILING PUBLICATION DATE</b>  <b>JAN 28 '14      FEB 07 '14</b>  <b>Office of Administrative Law</b>			
NOTICE		REGULATIONS	

AGENCY WITH RULEMAKING AUTHORITY  
State Board of Equalization

AGENCY FILE NUMBER (if any)

**A. PUBLICATION OF NOTICE (Complete for publication in Notice Register)**

1. SUBJECT OF NOTICE Taxable Sales of Food Products		TITLE(S) 18	FIRST SECTION AFFECTED 1603	2. REQUESTED PUBLICATION DATE February 7, 2014
3. NOTICE TYPE <input checked="" type="checkbox"/> Notice re Proposed Regulatory Action <input type="checkbox"/> Other		4. AGENCY CONTACT PERSON Richard E. Bennion		TELEPHONE NUMBER (916) 445-2130
				FAX NUMBER (Optional) (916) 324-3984
OAL USE ONLY	ACTION ON PROPOSED NOTICE <input type="checkbox"/> Approved as Submitted <input type="checkbox"/> Approved as Modified <input type="checkbox"/> Disapproved/Withdrawn		NOTICE REGISTER NUMBER	PUBLICATION DATE

**B. SUBMISSION OF REGULATIONS (Complete when submitting regulations)**

1a. SUBJECT OF REGULATION(S)		1b. ALL PREVIOUS RELATED OAL REGULATORY ACTION NUMBER(S)	
2. SPECIFY CALIFORNIA CODE OF REGULATIONS TITLE(S) AND SECTION(S) (Including title 26, if toxics related)			
ACTION(S) AFFECTED (List all section number(s) individually. Attach additional sheet if needed.)		ADOPT	
		AMEND	
TITLE(S)		REPEAL	
3. TYPE OF FILING			
<input type="checkbox"/> Regular Rulemaking (Gov. Code §11346) <input type="checkbox"/> Resubmittal of disapproved or withdrawn nonemergency filing (Gov. Code §511349.3, 11349.4) <input type="checkbox"/> Emergency (Gov. Code, §11346.1(b))			
<input type="checkbox"/> Certificate of Compliance: The agency officer named below certifies that this agency complied with the provisions of Gov. Code §§11346.2-11347.3 either before the emergency regulation was adopted or within the time period required by statute. <input type="checkbox"/> Resubmittal of disapproved or withdrawn emergency filing (Gov. Code, §11346.1)			
<input type="checkbox"/> Emergency Readopt (Gov. Code, §11346.1(h)) <input type="checkbox"/> File & Print <input type="checkbox"/> Other (Specify) _____			
<input type="checkbox"/> Changes Without Regulatory Effect (Cal. Code Regs., title 1, §100) <input type="checkbox"/> Print Only			
4. ALL BEGINNING AND ENDING DATES OF AVAILABILITY OF MODIFIED REGULATIONS AND/OR MATERIAL ADDED TO THE RULEMAKING FILE (Cal. Code Regs. title 1, §44 and Gov. Code §11347.1)			
5. EFFECTIVE DATE OF CHANGES (Gov. Code, §§ 11343.4, 11346.1(d); Cal. Code Regs., title 1, §100)			
<input type="checkbox"/> Effective January 1, April 1, July 1, or October 1 (Gov. Code §11343.4(a)) <input type="checkbox"/> Effective on filing with Secretary of State <input type="checkbox"/> \$100 Changes Without Regulatory Effect <input type="checkbox"/> Effective other (Specify) _____			
6. CHECK IF THESE REGULATIONS REQUIRE NOTICE TO, OR REVIEW, CONSULTATION, APPROVAL OR CONCURRENCE BY, ANOTHER AGENCY OR ENTITY			
<input type="checkbox"/> Department of Finance (Form STD. 399) (SAM §6660) <input type="checkbox"/> Fair Political Practices Commission <input type="checkbox"/> State Fire Marshal <input type="checkbox"/> Other (Specify) _____			
7. CONTACT PERSON		TELEPHONE NUMBER	FAX NUMBER (Optional)
			E-MAIL ADDRESS (Optional)

8. **I certify that the attached copy of the regulation(s) is a true and correct copy of the regulation(s) identified on this form, that the information specified on this form is true and correct, and that I am the head of the agency taking this action, or a designee of the head of the agency, and am authorized to make this certification.**

For use by Office of Administrative Law (OAL) only

SIGNATURE OF AGENCY HEAD OR DESIGNEE

DATE

TYPED NAME AND TITLE OF SIGNATORY

## **Notice of Proposed Regulatory Action**

### **The State Board of Equalization Proposes to Adopt Amendments to California Code of Regulations, Title 18, Section 1603, *Taxable Sales of Food Products***

#### **NOTICE IS HEREBY GIVEN**

The State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1603, *Taxable Sales of Food Products*. The proposed amendments add subdivision (u) to the regulation to describe the term “mobile food vendors,” provide that, “[f]or sales made on and after July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors’ sales of taxable items are presumed to be made on a tax included basis,” and provide that the “presumption does not apply when a mobile food vendor is making sales as a ‘caterer’ as defined in” subdivision (h)(1) of the regulation. The proposed amendments are intended to make the regulation consistent with the current practice in the mobile food industry, which is for mobile food vendors to include sales tax reimbursement in their menu prices.

#### **PUBLIC HEARING**

The Board will conduct a meeting in the Auditorium Room, at the California Public Utilities Commission’s headquarters, located at 505 Van Ness Avenue, San Francisco, California, on March 25, 2014. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board’s Website at [www.boe.ca.gov](http://www.boe.ca.gov) at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 10:00 a.m. or as soon thereafter as the matter may be heard on March 25, 2014. At the hearing, any interested person may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1603.

#### **AUTHORITY**

RTC section 7051

#### **REFERENCE**

RTC sections 6006, 6012, 6359, 6359.1, 6359.45, 6361, 6363, 6363.5, 6363.6, 6363.8, 6370, 6373, 6374, and 6376.5.

## INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

### Current Law

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (RTC § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (RTC §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers.

Civil Code section 1656.1 provides that whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. The sales tax reimbursement may be shown as a separately stated amount added to the stated sales price of the tangible personal property or the sales tax reimbursement may be included in the total price charged for tangible personal property. Under Civil Code section 1656.1, it shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property if the retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

Regulation 1700 contains a general presumption that taxable tangible personal property is sold at a price which includes tax reimbursement if the retailer posts a specified sign to that effect.

In 2001, Regulation 1574, *Vending Machine Operators*, was amended to delete the specific requirement that vending machine operators post a sign providing that their sales are made on a tax-included basis and to instead provide that sales of tangible personal property through vending machines are presumed to be made on a tax-included basis notwithstanding the fact that the signage discussed in Civil Code section 1656.1 is not present. The amendments were based on the nature of the vending machine industry and the expectation from customers purchasing items through vending machines that all taxable sales are made on a tax-included basis.

### Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1603

Mobile food vendors sell food for immediate consumption from motorized vehicles, such as food trucks, or un-motorized carts, such as hot dog carts. Mobile food vendors do not generally have point of sale systems to calculate tax on individual transactions. Additionally, they often make sales in multiple tax districts in a given day and as a result, their sales are often subject to varying tax rates. Therefore, similar to vending machine operators, whose sales are discussed in Regulation 1574, it is common practice in the mobile food industry for mobile food vendors to make sales on a tax-included basis and to round their menu prices to the nearest quarter or dollar. And, similar to the vending machine operators, mobile food vendors intend for the prices that they charge for the

meals that they sell to include all applicable taxes, and their customers expect that amounts for sales tax reimbursement are included in the prices charged by the mobile food vendors.

While the industry practice is for mobile food vendors to include sales tax reimbursement in their menu prices, during recent audits, many mobile food vendors did not have a sign posted stating that tax reimbursement was included in their menu prices.

### *Interested Parties Process*

The Board's Business Taxes Committee (BTC) staff drafted amendments adding a new subdivision (u) to Regulation 1603 to address the mobile food vendors' signage issue. The draft amendments suggested adding provisions to the regulation to describe the term "mobile food vendors" by providing that mobile food vendors include retailers who sell food and beverage for immediate consumption from motorized vehicles or un-motorized carts, and provide that mobile food vendors include vendors operating food trucks, coffee carts, and hot dog carts. The draft amendments also provided that effective July 1, 2014, sales by mobile food vendors are presumed to be made on a tax-included basis, unless a separate amount for tax reimbursement is added to the price. And, the draft amendments provided that this presumption does not apply when a mobile food vendor is making sales as a "caterer" as defined in subdivision (h)(1) of Regulation 1603.

BTC staff subsequently provided its draft amendments to Regulation 1603 to the interested parties and conducted an interested parties meeting in August 2013, to discuss the draft amendments. During the August meeting, participants discussed the effect of the presumption and asked BTC staff whether the new presumption might have some unintended effects, such as:

- Making it more likely for a person to be held personally liable for sales tax liabilities owed by its mobile food vending business under RTC section 6829;
- Making it more likely for a mobile food vendor to receive the 40 percent penalty imposed under RTC section 6597; and
- Potentially restricting mobile food vendors' participation in the Board's Offers in Compromise Program under RTC section 7093.6.

However, as explained in more detail in the initial statement of reasons, BTC staff determined that the potential effect of the new presumption was limited, particularly because the presumption may be overcome. And, BTC staff indicated that it was not necessary to revise the proposed amendments to Regulation 1603 to address the interested parties' questions because the new presumption, by itself, would not result in personal liability under RTC section 6829 or the imposition of the 40 percent penalty under RTC section 6597, and would not prevent a mobile food vendor from participating in the Offers in Compromise Program.

Following the interested parties meeting, other Board staff recommended that new subdivision (u) be revised to remove the language indicating that the new presumption

will be “[e]ffective July 1, 2014” and instead include new language stating that it will apply to “[s]ales made on or after July 1, 2014.” BTC staff agreed that the changes would make the application of the new presumption more clear and revised the draft amendments to the regulation, accordingly.

#### *November 19, 2013, BTC Meeting*

Subsequently, BTC staff prepared Formal Issue Paper 13-009 and distributed it to the Board Members for consideration at the Board’s November 19, 2013, BTC meeting. Formal Issue Paper 13-009 recommended that the Board propose to add new subdivision (u) to Regulation 1603 which generally describes “mobile food vendors,” and provides that, “[f]or sales made on and after July 1, 2014, unless a separate amount for tax reimbursement is added to the price of meals, a mobile food vendors’ sales of taxable items are presumed to be made on a tax included basis,” and provide that “[t]his presumption does not apply when a mobile food vendor is making sales as a ‘caterer’” as defined in subdivision (h)(1) of Regulation 1603.

At the conclusion of the Board’s discussion of Formal Issue Paper 13-009 during the November 19, 2013, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1603 recommended in the formal issue paper.

The Board anticipates that the proposed amendments to Regulation 1603 will promote fairness and benefit taxpayers, Board staff, and the Board by providing regulatory provisions consistent with industry practice and the understanding of mobile food vendors and their customers that mobile food vendors’ sales are made on a tax-included basis.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1603 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations. This is because the proposed amendments to Regulation 1603 are consistent with the 2001 amendments to Regulation 1574, discussed above, and there are no other sales and use tax regulations that specifically apply to mobile food vendors’ collection of sales tax reimbursement. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1603 or the proposed amendments to Regulation 1603.

#### **NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS**

The Board has determined that the adoption of the proposed amendments to Regulation 1603 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

## NO COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1603 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

## NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1603 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1603 may affect small business.

## NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

## RESULTS OF THE ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

The Board has determined that the proposed amendments to Regulation 1603 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1603 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1603 will not affect the benefits of Regulation 1603 to the health and welfare of California residents, worker safety, or the state's environment.

## NO SIGNIFICANT EFFECT ON HOUSING COSTS

The adoption of the proposed amendments to Regulation 1603 will not have a significant effect on housing costs.

## DETERMINATION REGARDING ALTERNATIVES

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

#### CONTACT PERSONS

Questions regarding the substance of the proposed amendments should be directed to Cary Huxsoll, Tax Counsel III, by telephone at (916) 323-3092, by e-mail at [Cary.Huxsoll@boe.ca.gov](mailto:Cary.Huxsoll@boe.ca.gov), or by mail at State Board of Equalization, Attn: Cary Huxsoll, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at [Richard.Bennion@boe.ca.gov](mailto:Richard.Bennion@boe.ca.gov), or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

#### WRITTEN COMMENT PERIOD

The written comment period ends at 10:00 a.m. on March 25, 2014, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1603 during the March 25-26, 2014, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1603. The Board will only consider written comments received by that time.

#### AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikeout version of the text of Regulation 1603 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1603, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).



## SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1603 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

## AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1603, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

## **Bennion, Richard**

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**From:** BOE-Board Meeting Material  
**Sent:** Friday, February 07, 2014 12:44 PM  
**To:** Alonzo, Mary Ann (Legal); Angeja, Jeff (Legal); Angeles, Joel; Appleby, Jaclyn; Armenta, Christopher; Baetge, Michelle; Bartolo, Lynn; Bennion, Richard; Benson, Bill; Bisauta, Christine (Legal); Blake, Sue; BOE-Board Meeting Material; Boyle, Kevin; Bridges, Cynthia; Brown, Michele C; Chung, Sophia (Legal); Cruz, Giovan; Davis, Toya P.; Delgado, Maria; Dixon, Camille; Duran, David; Elliott, Claudia; Epolite, Anthony (Legal); Ferris, Randy (Legal); Ford, Ladeena L; Garcia, Laura; Gau, David; Gilman, Todd; Goehring, Teresa; Hale, Mike; Hamilton, Tabitha; Hanohano, Rebecca; Harvill, Mai; He, Mengjun; Heller, Bradley (Legal); Hellmuth, Leila; Herrera, Cristina; Holmes, Dana; Hughes, Shellie L; Jacobson, Andrew; Kinkle, Sherrie L; Kinst, Lynne; Kruckenberg, Kendra; Kuhl, James; Lambert, Gary; Lambert, Robert (Legal); Lee, Chris; Levine, David H. (Legal); LoFaso, Alan; Madrigal, Claudia; Mandel, Marcy Jo; Matsumoto, Sid; McGuire, Jeff; Miller, Brad; Mandel, Marcy Jo @ SCO; Moon, Richard (Legal); Morquecho, Raymond; Nienow, Trecia (Legal); Oakes, Clifford; Pielsticker, Michele; Ralston, Natasha; Richmond, Joann; Riley, Denise (Legal); Salazar, Ramon; Salgado-Ponce, Sylvia; Schultz, Glenna; Shah, Neil; Silva, Monica (Legal); Singh, Sam; Smith, Kevin (Legal); Smith, Rose; Stowers, Yvette; Suero-Gabler, Cynthia; Torres, Rodrigo; Torres, Rodrigo; Tran, Mai (Legal); Treichelt, Tim; Tucker, Robert (Legal); Vandrick, Tanya; Vasquez, Rosalyn; Vigil, Michael; Wallentine, Sean; Whitaker, Lynn; White, Sharon; Williams, Lee; Zivkovich, Robert  
**Subject:** State Board of Equalization - Announcement of Regulatory Change 1603

The State Board of Equalization proposes to adopt amendments to Regulation 1603, Taxable Sales of Food Products. A public hearing regarding the proposed amendments will be held in the Auditorium Room, at the California Public Utilities Commission's Headquarters, located at 505 Van Ness Avenue, San Francisco, California, at 10:00 a.m., or as soon thereafter as the matter may be heard, on Tuesday, March 25, 2014.

The proposed amendments to Regulation 1603, Taxable Sales of Food Products, provide that mobile food vendors' sales of items subject to tax, on or after July 1, 2014, are presumed to be made on a tax-included basis.

To view the notice of hearing, initial statement of reasons, proposed text, and history click on the following link:  
[http://www.boe.ca.gov/regs/reg\\_1603\\_2014.htm](http://www.boe.ca.gov/regs/reg_1603_2014.htm) .

Questions regarding the substance of the proposed amendments should be directed to Mr. Cary Huxsoll, Tax Counsel III, at 450 N Street, MIC:82, Sacramento, CA 94279-0082, email [Cary.Huxsoll@boe.ca.gov](mailto:Cary.Huxsoll@boe.ca.gov), telephone (916) 323-3092, or FAX (916) 323-3387.

Written comments for the Board's consideration, notices of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed regulatory action should be directed to Mr. Rick Bennion, Regulations Coordinator, telephone (916) 445-2130, fax (916) 324-3984, e-mail [Richard.Bennion@boe.ca.gov](mailto:Richard.Bennion@boe.ca.gov) or by mail to: State Board of Equalization, Attn: Rick Bennion, MIC: 80, P.O. Box 942879-0080, Sacramento, CA 94279-0080.

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Please do not reply to this message.

Board Proceedings Division, MIC:80  
Rick Bennion  
Regulations Coordinator  
Phone (916) 445-2130  
Fax (916) 324-3984  
[Richard.Bennion@boe.ca.gov](mailto:Richard.Bennion@boe.ca.gov)

## **Bennion, Richard**

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**From:** State Board of Equalization - Announcement of Regulatory Change  
<Legal.Regulations@BOE.CA.GOV>  
**Sent:** Friday, February 07, 2014 2:12 PM  
**To:** BOE\_REGULATIONS@LISTSERV.STATE.CA.GOV  
**Subject:** State Board of Equalization - Announcement of Regulatory Change 1603

The State Board of Equalization proposes to adopt amendments to Regulation 1603, Taxable Sales of Food Products. A public hearing regarding the proposed amendments will be held in the Auditorium Room, at the California Public Utilities Commission's Headquarters, located at 505 Van Ness Avenue, San Francisco, California, at 10:00 a.m., or as soon thereafter as the matter may be heard, on Tuesday, March 25, 2014.

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To view the notice of hearing, initial statement of reasons, proposed text, and history click on the following link:  
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express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1699, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

#### SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1699 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

#### AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1699, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

## TITLE 18. BOARD OF EQUALIZATION

### **The State Board of Equalization Proposes to Adopt Amendments to California Code of Regulations, Title 18, Section 1603, *Taxable Sales of Food Products***

#### NOTICE IS HEREBY GIVEN

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#### PUBLIC HEARING

The Board will conduct a meeting in the Auditorium Room, at the California Public Utilities Commission's headquarters, located at 505 Van Ness Avenue, San Francisco, California, on March 25, 2014. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov) at least 10 days in advance of the meeting.

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#### AUTHORITY

RTC section 7051.

#### REFERENCE

RTC sections 6006, 6012, 6359, 6359.1, 6359.45, 6361, 6363, 6363.5, 6363.6, 6363.8, 6370, 6373, 6374, and 6376.5.

INFORMATIVE DIGEST/POLICY STATEMENT  
OVERVIEW

Current Law

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (RTC § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (RTC §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers.

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Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1603

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in a given day and as a result, their sales are often subject to varying tax rates. Therefore, similar to vending machine operators, whose sales are discussed in Regulation 1574, it is common practice in the mobile food industry for mobile food vendors to make sales on a tax-included basis and to round their menu prices to the nearest quarter or dollar. And, similar to the vending machine operators, mobile food vendors intend for the prices that they charge for the meals that they sell to include all applicable taxes, and their customers expect that amounts for sales tax reimbursement are included in the prices charged by the mobile food vendors.

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BTC staff subsequently provided its draft amendments to Regulation 1603 to the interested parties and conducted an interested parties meeting in August 2013, to discuss the draft amendments. During the August meeting, participants discussed the effect of the presumption and asked BTC staff whether the new presumption might have some unintended effects, such as:

- Making it more likely for a person to be held personally liable for sales tax liabilities owed by its mobile food vending business under RTC section 6829;
- Making it more likely for a mobile food vendor to receive the 40 percent penalty imposed under RTC section 6597; and
- Potentially restricting mobile food vendors' participation in the Board's Offers in Compromise Program under RTC section 7093.6.

However, as explained in more detail in the initial statement of reasons, BTC staff determined that the potential effect of the new presumption was limited, particularly because the presumption may be overcome. And, BTC staff indicated that it was not necessary to revise the proposed amendments to Regulation 1603 to address the interested parties' questions because the new presumption, by itself, would not result in personal liability under RTC section 6829 or the imposition of the 40 percent penalty under RTC section 6597, and would not prevent a mobile food vendor from participating in the Offers in Compromise Program.

Following the interested parties meeting, other Board staff recommended that new subdivision (u) be revised to remove the language indicating that the new presumption will be "[e]ffective July 1, 2014" and instead include new language stating that it will apply to "[s]ales made on or after July 1, 2014." BTC staff agreed that the changes would make the application of the new presumption more clear and revised the draft amendments to the regulation, accordingly.

*November 19, 2013, BTC Meeting*

Subsequently, BTC staff prepared Formal Issue Paper 13-009 and distributed it to the Board Members for consideration at the Board's November 19, 2013, BTC meeting. Formal Issue Paper 13-009 recommended that the Board propose to add new subdivision (u) to Regulation 1603 which generally describes "mobile food vendors," and provides that, "[f]or sales made on and after July 1, 2014, unless a separate amount for tax reimbursement is added to the price of meals, a mobile food vendors' sales of taxable items are presumed to be made on a tax included basis," and provide that "[t]his presumption does not apply when a mobile food vendor is making sales as a 'caterer'" as defined in subdivision (h)(1) of Regulation 1603.

At the conclusion of the Board's discussion of Formal Issue Paper 13-009 during the November 19, 2013, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1603 recommended in the formal issue paper.

The Board anticipates that the proposed amendments to Regulation 1603 will promote fairness and benefit taxpayers, Board staff, and the Board by providing regulatory provisions consistent with industry practice and the understanding of mobile food vendors and their customers that mobile food vendors' sales are made on a tax-included basis.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1603 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are

not inconsistent or incompatible with existing state regulations. This is because the proposed amendments to Regulation 1603 are consistent with the 2001 amendments to Regulation 1574, discussed above, and there are no other sales and use tax regulations that specifically apply to mobile food vendors' collection of sales tax reimbursement. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1603 or the proposed amendments to Regulation 1603.

#### NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1603 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

#### NO COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS

The Board has determined that the adoption of the proposed amendments to Regulation 1603 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

#### NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1603 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1603 may affect small business.

#### NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

**RESULTS OF THE ECONOMIC IMPACT  
ASSESSMENT REQUIRED BY GOVERNMENT  
CODE SECTION 11346.3, SUBDIVISION (b)**

The Board has determined that the proposed amendments to Regulation 1603 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1603 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1603 will not affect the benefits of Regulation 1603 to the health and welfare of California residents, worker safety, or the state's environment.

**NO SIGNIFICANT EFFECT ON  
HOUSING COSTS**

The adoption of the proposed amendments to Regulation 1603 will not have a significant effect on housing costs.

**DETERMINATION REGARDING  
ALTERNATIVES**

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

**CONTACT PERSONS**

Questions regarding the substance of the proposed amendments should be directed to Cary Huxsoll, Tax Counsel III, by telephone at (916) 323-3092, by e-mail at [Cary.Huxsoll@boe.ca.gov](mailto:Cary.Huxsoll@boe.ca.gov), or by mail at State Board of Equalization, Attn: Cary Huxsoll, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed

administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at [Richard.Bennion@boe.ca.gov](mailto:Richard.Bennion@boe.ca.gov), or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

**WRITTEN COMMENT PERIOD**

The written comment period ends at 10:00 a.m. on March 25, 2014, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1603 during the March 25-26, 2014, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1603. The Board will only consider written comments received by that time.

**AVAILABILITY OF INITIAL STATEMENT OF  
REASONS AND TEXT OF  
PROPOSED REGULATION**

The Board has prepared an underscored and strikeout version of the text of Regulation 1603 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1603, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

**SUBSTANTIALLY RELATED CHANGES  
PURSUANT TO GOVERNMENT CODE  
SECTION 11346.8**

The Board may adopt the proposed amendments to Regulation 1603 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a suf-

ficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

#### AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1603, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

#### TITLE 18. FRANCHISE TAX BOARD

As required by Section 11346.4 of the Government Code, the Franchise Tax Board hereby gives notice of its intention to adopt California Code of Regulations, title 18, section 17942, pertaining to the limited liability company ("LLC") fee. There will not be a public hearing unless requested by an interested person at least 15 days before the close of the written comment period. Any request for a public hearing should be submitted to the agency officer named below. Government Code section 15702, subdivision (b), provides for consideration by the three-member Franchise Tax Board of any proposed regulatory action if any person makes such request in writing.

#### WRITTEN COMMENT PERIOD

Written comments will be accepted until 5:00 p.m., March 27, 2014. All relevant matters presented will be considered before the proposed regulatory action is taken. Comments should be submitted to the agency officers named below.

#### AUTHORITY & REFERENCE

Revenue and Taxation Code ("RTC") section 19503 authorizes the Franchise Tax Board to prescribe regulations necessary for the enforcement of Part 10 (commencing with section 17001), Part 10.2 (commencing with section 18401), Part 10.7 (commencing with section 21001) and Part 11 (commencing with section 23001). Regulating under RTC section 17942 is neces-

sary to provide guidance and examples for the proper application and implementation of RTC section 17942.

#### INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

LLCs doing business in California are required to pay an annual fee to the Franchise Tax Board based on the total amount of income attributable to California during the taxable year. In 2007, the requirement to pay an annual fee was amended to address concerns that the fee was based in part on income not attributable to California. The objective of this proposed regulation is to provide clarification and offer guidance to LLCs doing business in California, and thus, those that are required to pay the annual fee, as to the proper methodology to be used in calculating such fee.

#### Regulation section 17942, subsection (a) — General Rule

Subsection (a) of the regulation restates the general rule that every LLC subject to California taxation must pay an annual fee determined by the "total income from all sources derived from or attributable to this state." This fee is in addition to the tax imposed on LLCs pursuant to RTC section 17941.

#### Regulation section 17942, subsection (b) — Definitions

Subsection (b) defines "total income from all sources derived from or attributable to this state," and is a restatement of the rule outlined in RTC section 17942(b)(1)(A):

(b) "Total income from all sources derived from or attributable to this state" means gross income, as defined in Revenue and Taxation Code section 24271, plus the cost of goods sold that is paid in or incurred in connection with the trade or business of the taxpayer. This amount does not include, however, any allocation or attribution of income or gain or distributions made to the limited liability company in its capacity as a member or holder of an economic interest in another limited liability company, so long as the income of the limited liability company that earned the income was itself subject to the fee described in Revenue and Taxation Code section 17942.

Subsection (b) also provides an example of the application of the definition. The example illustrates the meaning of a taxpayer being "subject to" an LLC fee. In the example, LLC A owns an interest in another LLC, LLC B, which has \$200,000 of total income from all sources derived from or attributable to California. The example concludes that because LLC B has income below \$250,000, it is not required to pay an LLC fee. Furthermore, in determining the fee owed by LLC A, LLC





STATE OF CALIFORNIA

**STATE BOARD OF EQUALIZATION**

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JOHN CHIANG  
State Controller

CYNTHIA BRIDGES  
Executive Director

**February 7, 2014**

**To Interested Parties:**

**Notice of Proposed Regulatory Action**

**The State Board of Equalization Proposes to Adopt Amendments to  
California Code of Regulations, Title 18,  
Section 1603, *Taxable Sales of Food Products***

**NOTICE IS HEREBY GIVEN**

The State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1603, *Taxable Sales of Food Products*. The proposed amendments add subdivision (u) to the regulation to describe the term “mobile food vendors,” provide that, “[f]or sales made on and after July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors’ sales of taxable items are presumed to be made on a tax included basis,” and provide that the “presumption does not apply when a mobile food vendor is making sales as a ‘caterer’ as defined in” subdivision (h)(1) of the regulation. The proposed amendments are intended to make the regulation consistent with the current practice in the mobile food industry, which is for mobile food vendors to include sales tax reimbursement in their menu prices.

**PUBLIC HEARING**

The Board will conduct a meeting in the Auditorium Room, at the California Public Utilities Commission’s headquarters, located at 505 Van Ness Avenue, San Francisco, California, on March 25, 2014. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board’s Website at [www.boe.ca.gov](http://www.boe.ca.gov) at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 10:00 a.m. or as soon thereafter as the matter may be heard on March 25, 2014. At the hearing, any interested person

may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1603.

## **AUTHORITY**

RTC section 7051

## **REFERENCE**

RTC sections 6006, 6012, 6359, 6359.1, 6359.45, 6361, 6363, 6363.5, 6363.6, 6363.8, 6370, 6373, 6374, and 6376.5.

## **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

### Current Law

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (RTC § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (RTC §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers.

Civil Code section 1656.1 provides that whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. The sales tax reimbursement may be shown as a separately stated amount added to the stated sales price of the tangible personal property or the sales tax reimbursement may be included in the total price charged for tangible personal property. Under Civil Code section 1656.1, it shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property if the retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

Regulation 1700 contains a general presumption that taxable tangible personal property is sold at a price which includes tax reimbursement if the retailer posts a specified sign to that effect.

In 2001, Regulation 1574, *Vending Machine Operators*, was amended to delete the specific requirement that vending machine operators post a sign providing that their sales are made on a tax-included basis and to instead provide that sales of tangible personal property through vending machines are presumed to be made on a tax-included basis notwithstanding the fact that the signage discussed in Civil Code section 1656.1 is not present. The amendments were based on the nature of the vending machine industry and the expectation from customers purchasing items through vending machines that all taxable sales are made on a tax-included basis.

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1603

Mobile food vendors sell food for immediate consumption from motorized vehicles, such as food trucks, or un-motorized carts, such as hot dog carts. Mobile food vendors do not generally have point of sale systems to calculate tax on individual transactions. Additionally, they often make sales in multiple tax districts in a given day and as a result, their sales are often subject to varying tax rates. Therefore, similar to vending machine operators, whose sales are discussed in Regulation 1574, it is common practice in the mobile food industry for mobile food vendors to make sales on a tax-included basis and to round their menu prices to the nearest quarter or dollar. And, similar to the vending machine operators, mobile food vendors intend for the prices that they charge for the meals that they sell to include all applicable taxes, and their customers expect that amounts for sales tax reimbursement are included in the prices charged by the mobile food vendors.

While the industry practice is for mobile food vendors to include sales tax reimbursement in their menu prices, during recent audits, many mobile food vendors did not have a sign posted stating that tax reimbursement was included in their menu prices.

*Interested Parties Process*

The Board's Business Taxes Committee (BTC) staff drafted amendments adding a new subdivision (u) to Regulation 1603 to address the mobile food vendors' signage issue. The draft amendments suggested adding provisions to the regulation to describe the term "mobile food vendors" by providing that mobile food vendors include retailers who sell food and beverage for immediate consumption from motorized vehicles or un-motorized carts, and provide that mobile food vendors include vendors operating food trucks, coffee carts, and hot dog carts. The draft amendments also provided that effective July 1, 2014, sales by mobile food vendors are presumed to be made on a tax-included basis, unless a separate amount for tax reimbursement is added to the price. And, the draft amendments provided that this presumption does not apply when a mobile food vendor is making sales as a "caterer" as defined in subdivision (h)(1) of Regulation 1603.

BTC staff subsequently provided its draft amendments to Regulation 1603 to the interested parties and conducted an interested parties meeting in August 2013, to discuss the draft amendments. During the August meeting, participants discussed the effect of the presumption and asked BTC staff whether the new presumption might have some unintended effects, such as:

- Making it more likely for a person to be held personally liable for sales tax liabilities owed by its mobile food vending business under RTC section 6829;
- Making it more likely for a mobile food vendor to receive the 40 percent penalty imposed under RTC section 6597; and
- Potentially restricting mobile food vendors' participation in the Board's Offers in Compromise Program under RTC section 7093.6.

However, as explained in more detail in the initial statement of reasons, BTC staff determined that the potential effect of the new presumption was limited, particularly because the presumption may be overcome. And, BTC staff indicated that it was not necessary to revise the proposed amendments to Regulation 1603 to address the interested parties' questions because the new presumption, by itself, would not result in personal liability under RTC section 6829 or the imposition of the 40 percent penalty under RTC section 6597, and would not prevent a mobile food vendor from participating in the Offers in Compromise Program.

Following the interested parties meeting, other Board staff recommended that new subdivision (u) be revised to remove the language indicating that the new presumption will be "[e]ffective July 1, 2014" and instead include new language stating that it will apply to "[s]ales made on or after July 1, 2014." BTC staff agreed that the changes would make the application of the new presumption more clear and revised the draft amendments to the regulation, accordingly.

*November 19, 2013, BTC Meeting*

Subsequently, BTC staff prepared Formal Issue Paper 13-009 and distributed it to the Board Members for consideration at the Board's November 19, 2013, BTC meeting. Formal Issue Paper 13-009 recommended that the Board propose to add new subdivision (u) to Regulation 1603 which generally describes "mobile food vendors," and provides that, "[f]or sales made on and after July 1, 2014, unless a separate amount for tax reimbursement is added to the price of meals, a mobile food vendors' sales of taxable items are presumed to be made on a tax included basis," and provide that "[t]his presumption does not apply when a mobile food vendor is making sales as a 'caterer'" as defined in subdivision (h)(1) of Regulation 1603.

At the conclusion of the Board's discussion of Formal Issue Paper 13-009 during the November 19, 2013, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1603 recommended in the formal issue paper.

The Board anticipates that the proposed amendments to Regulation 1603 will promote fairness and benefit taxpayers, Board staff, and the Board by providing regulatory provisions consistent with industry practice and the understanding of mobile food vendors and their customers that mobile food vendors' sales are made on a tax-included basis.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1603 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations. This is because the proposed amendments to Regulation 1603 are consistent with the 2001 amendments to Regulation 1574, discussed above, and there are no other sales and use tax regulations that specifically apply to mobile food vendors' collection of sales tax reimbursement. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1603 or the proposed amendments to Regulation 1603.

### **NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS**

The Board has determined that the adoption of the proposed amendments to Regulation 1603 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

### **NO COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS**

The Board has determined that the adoption of the proposed amendments to Regulation 1603 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

### **NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1603 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1603 may affect small business.

### **NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES**

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

### **RESULTS OF THE ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)**

The Board has determined that the proposed amendments to Regulation 1603 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1603 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1603 will not affect the benefits of Regulation 1603 to the health and welfare of California residents, worker safety, or the state's environment.

## **NO SIGNIFICANT EFFECT ON HOUSING COSTS**

The adoption of the proposed amendments to Regulation 1603 will not have a significant effect on housing costs.

## **DETERMINATION REGARDING ALTERNATIVES**

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

## **CONTACT PERSONS**

Questions regarding the substance of the proposed amendments should be directed to Cary Huxsoll, Tax Counsel III, by telephone at (916) 323-3092, by e-mail at [Cary.Huxsoll@boe.ca.gov](mailto:Cary.Huxsoll@boe.ca.gov), or by mail at State Board of Equalization, Attn: Cary Huxsoll, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at [Richard.Bennion@boe.ca.gov](mailto:Richard.Bennion@boe.ca.gov), or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

## **WRITTEN COMMENT PERIOD**

The written comment period ends at 10:00 a.m. on March 25, 2014, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1603 during the March 25-26, 2014, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1603. The Board will only consider written comments received by that time.

February 7, 2014

## AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION

The Board has prepared an underscored and strikeout version of the text of Regulation 1603 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1603, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

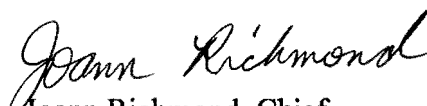
## SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8

The Board may adopt the proposed amendments to Regulation 1603 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

## AVAILABILITY OF FINAL STATEMENT OF REASONS

If the Board adopts the proposed amendments to Regulation 1603, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov)

Sincerely,


  
Joann Richmond, Chief  
Board Proceedings Division

STATE BOARD OF EQUALIZATION



BOARD APPROVED

At the March 25, 2014 Board Meeting

  
Joann Richmond, Chief  
Board Proceedings Division

**Initial Statement of Reasons for**  
**Proposed Amendments to California Code of Regulations,**  
**Title 18, Section 1603, *Taxable Sales of Food Products***

SPECIFIC PURPOSE, PROBLEM INTENDED TO BE ADDRESSED, NECESSITY, AND ANTICIPATED BENEFIT

Current Law

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (Rev. & Tax. Code, § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (Rev. & Tax. Code, §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers.

Civil Code section 1656.1 provides that whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. The sales tax reimbursement may be shown as a separately stated amount added to the separately stated sales price of the tangible personal property or the sales tax reimbursement may be included in the total lump-sum price charged for tangible personal property. Under Civil Code section 1656.1, it shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property if the retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable. California Code of Regulations, title 18, section (Regulation) 1700, generally provides that:

It shall be presumed that the property, the gross receipts from the sale of which is subject to the sales tax, is sold at a price which includes tax reimbursement if the retailer posts in his or her premises, or includes on a price tag or in an advertisement (whichever is applicable) one of the following notices:

1. "All prices of taxable items include sales tax reimbursement computed to the nearest mill."
2. "The price of this item includes sales tax reimbursement computed to the nearest mill."

Prior to 2001, Regulation 1574, *Vending Machine Operators*, also specifically provided that sales made through vending machines would be regarded as having been made on a tax-included basis if the vending machine operator posted a sign on or near the vending machine providing that "all prices of taxable items include sales tax reimbursement . . ." As relevant here, in 2001, Regulation 1574 was amended to delete the requirement that vending machine operators post a



sign providing that their sales are made on a tax-included basis and to instead provide that “[s]ales of tangible personal property through vending machines are presumed to be made on a tax-included basis,” notwithstanding the fact that the signage discussed in Civil Code section 1656.1 is not present. The 2001 amendments were based on the nature of the vending machine industry and the expectation from customers purchasing items through vending machines that all taxable sales are made on a tax-included basis.

### Proposed Amendments

Mobile food vendors who sell food for immediate consumption from motorized vehicles, such as food trucks, or un-motorized carts, such as hot dog carts, do not generally have point of sale systems to calculate tax on individual transactions. Additionally, they often make sales in multiple tax districts in a given day and, as a result, their sales are often subject to varying tax rates. Therefore, similar to vending machine operators whose sales are discussed in Regulation 1574, it is common practice in the mobile food industry for mobile food vendors to make sales on a tax-included basis. It is common practice in the mobile food industry for mobile food vendors to round their tax-included prices to the nearest quarter or dollar. And, similar to the retailers and customers in the vending machine industry, mobile food vendors intend for the prices charged for the meals that they sell to include all applicable taxes, and their customers expect that amounts for sales tax reimbursement are included in the prices charged by the mobile food vendors.

In addition, while the mobile food industry practice is for mobile food vendors to include tax reimbursement in their menu prices, during recent audits, Board staff found that many mobile food vendors did not have a sign posted stating that tax reimbursement was included in their menu prices.

### *Interested Parties Process*

The Board’s Business Taxes Committee (BTC) staff prepared draft amendments adding a new subdivision (u) to Regulation 1603, *Taxable Sales of Food Products*, to address the mobile food vendors’ signage issue (or problem within the meaning of Gov. Code, § 11346.2, subdivision (b)). The draft amendments suggested adding provisions to the regulation generally describes “mobile food vendors” by providing that mobile food vendors include retailers who sell food and beverages for immediate consumption from motorized vehicles or un-motorized carts. The draft amendments provided that such vendors include vendors operating food trucks, coffee carts, and hot dog carts. The draft amendments also provided that effective July 1, 2014, sales by mobile food vendors are presumed to be made on a tax-included basis unless a separate amount for tax reimbursement is added to the price. And, the draft amendments provided that this presumption does not apply when a mobile food vendor is making sales as a “caterer” as defined in subdivision (h)(1) of Regulation 1603.

BTC staff subsequently provided its draft amendments to Regulation 1603 to the interested parties and conducted an interested parties meeting in August 2013 to discuss the draft amendments. During the August meeting, participants discussed the effect of the presumption and asked BTC staff whether the new presumption might have some unintended effects, such as:

- Making it more likely for a person to be held personally liable for sales tax liabilities owed by its mobile food vending business under RTC section 6829;
- Making it more likely for a mobile food vendor to receive the 40 percent penalty imposed under RTC section 6597; and
- Potentially restricting mobile food vendors' participation in the Board's Offers in Compromise Program under RTC section 7093.6.

BTC staff determined that the potential effect of the new presumption was limited, particularly because the presumption may be overcome. BTC staff also determined that the instances in which a retailer would need to overcome the presumption were uncommon.

With respect to personal liability imposed under RTC section 6829, as stated above, the presumption can be overcome. Further, collection of tax reimbursement is only one of the four required elements. The Board cannot hold a responsible person liable for sales tax reimbursement the business collected, unless the Board can also demonstrate that the person willfully failed to pay the tax or cause it to be paid to the Board. Consequently, the presumption alone is unlikely to have a significant impact on responsible person liability. Similarly, the presumption does not increase the likelihood that the 40 percent penalty imposed under RTC section 6597 will apply. For the penalty to apply, in addition to evidence that taxpayer charged or collected tax reimbursement, it must also be shown by "clear and convincing" evidence that the deficiency was the result of an intent to evade the tax. With respect to the Offers in Compromise program, the operation of the presumption would not preclude a taxpayer from participating in the program. For an ongoing business to participate in the program, it need only provide evidence to rebut the presumption that tax reimbursement was collected. Therefore, BTC staff determined that it was not necessary to draft and suggest further amendments to Regulation 1603 to address the application of RTC sections 6597, 6829, and 7093.6, at this time.

Following the interested parties meeting, other Board staff recommended that new subdivision (u) be revised to remove the language indicating that the new presumption will be "[e]ffective July 1, 2014" and instead include new language stating that it will apply to mobile food vendors' "[s]ales made on or after July 1, 2014." BTC staff agreed that the changes would make the application of the new presumption more clear and revised the draft amendments to the regulation, accordingly.

#### *November 19, 2013, BTC Meeting*

Subsequently, BTC staff prepared Formal Issue Paper 13-009 and distributed it to the Board Members for consideration at the Board's November 19, 2013, BTC meeting. Formal Issue Paper 13-009 recommended that the Board propose to add subdivision (u) to Regulation 1603 to define the term "mobile food vendors," and provide that, for sales made on and after July 1, 2014, unless a separate amount for tax reimbursement is added to the price of meals, a mobile food vendors' sales of taxable items are presumed to be made on a tax included basis. The formal issue paper also recommended that new subdivision (u) provide that this presumption does not apply when a mobile food vendor is making sales as a "caterer" as defined in subdivision (h)(1) of Regulation 1603.

At the conclusion of the Board's discussion of Formal Issue Paper 13-009 during the November 19, 2013, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1603 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1603 are reasonably necessary to have the effect and accomplish the specific purpose of addressing the mobile food vendors' signage issue by permitting mobile food vendors to make sales on a tax included basis even in the absence of signage expressly providing that their sales are made on a tax-included basis.

The Board anticipates that the proposed amendments to Regulation 1603 will promote fairness and benefit taxpayers, Board staff, and the Board by providing regulatory provisions consistent with industry practice and the understanding of mobile food vendors and their customers that mobile food vendors' sales are made on a tax-included basis.

In addition, the Board has determined that the proposed amendments are not mandated by federal law or regulations, and there are no federal regulations or statutes that are identical to Regulation 1603 or the proposed amendments to Regulation 1603.

#### DOCUMENTS RELIED UPON

The Board relied upon Formal Issue Paper 13-009, the exhibits to the issue paper, and the comments made during the Board's discussion of the issue paper during its November 19, 2013, BTC meeting in deciding to propose the amendments to Regulation 1603 described above.

#### ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1603 at this time or, alternatively, whether to take no action at this time. The Board decided to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1603 at this time because the Board determined that the proposed amendments are reasonably necessary for the reasons set forth above.

The Board did not reject any reasonable alternative to the proposed amendments to Regulation 1603 that would lessen any adverse impact the proposed action may have on small business or that would be less burdensome and equally effective in achieving the purposes of the proposed action. No reasonable alternative has been identified and brought to the Board's attention that would lessen any adverse impact the proposed action may have on small business, be more effective in carrying out the purposes for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

INFORMATION REQUIRED BY GOVERNMENT CODE SECTION 11346.2,  
SUBDIVISION (b)(5) AND ECONOMIC IMPACT ASSESSMENT REQUIRED BY  
GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

The sales tax reimbursement may be shown as a separately stated amount added to the stated sales price of the tangible personal property or the sales tax reimbursement may be included in the total lump-sum price charged for tangible personal property. As previously explained, under Civil Code section 1656.1, it shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property if the retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable. Regulation 1700 contains a general presumption that taxable tangible personal property is sold at a price which includes tax reimbursement if the retailer posts a specified sign to that effect.

As previously explained, mobile food vendors do not generally have point of sale systems to calculate tax on individual transactions. Additionally, they often make sales in multiple tax districts in a given day and, as a result, their sales are often subject to varying tax rates. Therefore, it is common practice in the mobile food industry for mobile food vendors to make sales on a tax-included basis. It is common practice in the mobile food industry for mobile food vendors to round their tax-included prices to the nearest quarter or dollar. And, mobile food vendors generally intend for the prices charged for the meals that they sell to include all applicable taxes, and their customers expect that amounts for sales tax reimbursement are included in prices charged by the mobile food vendors.

Also, as previously explained, while the mobile food industry practice is for mobile food vendors to include tax reimbursement in their menu prices, during recent audits, Board staff found that many mobile food vendors did not have a sign posted stating that tax was included in their menu prices.

The amendments to Regulation 1603 generally describe “mobile food vendors” and provide that for sales made by mobile food vendors on or after July 1, 2014, it is presumed that the sales are made on a tax-included basis, unless the vendor adds a separate amount for tax reimbursement to the price charged to its customer. The proposed amendments are intended to make Regulation 1603 consistent with the mobile food industry’s practice, which is to include tax reimbursement in menu prices, and there is nothing in the proposed amendments to Regulation 1603 that would significantly change how mobile food vendors and their customers would generally behave in the absence of the proposed amendments.

In addition, the amendments to Regulation 1603 do not require any further action by mobile food vendors or their customers in order for the presumption to apply, and the proposed amendments permit, but do not require mobile food vendors to rebut the presumption by adding a separate amount for sales tax reimbursement to the sale price of the items they sale. Therefore, the proposed amendments do not impose any costs on any persons, including mobile food vending businesses. The Board estimates that the proposed amendments will not have a measurable economic impact on individuals and business. And, the Board has determined that the proposed amendments to Regulation 1603 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, because the Board has estimated that the proposed amendments will not have an economic impact on California

business enterprises and individuals in an amount exceeding fifty million dollars (\$50,000,000) during any 12-month period.

Further, based on these facts and all of the information in the rulemaking file, the Board has also determined that the adoption of the proposed amendments to Regulation 1603 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California.

Furthermore, Regulation 1603 does not regulate the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has also determined that the adoption of the proposed amendments to Regulation 1603 will not affect the benefits of Regulation 1603 to the health and welfare of California residents, worker safety, or the state's environment.

The forgoing information also provides the factual basis for the Board's initial determination that the adoption of the proposed amendments to Regulation 1603 will not have a significant adverse economic impact on business.

The proposed amendments to Regulation 1603 may affect small businesses.

**Text of Proposed Amendments to  
California Code of Regulations, Title 18, Section 1603**

**1603. Taxable Sales of Food Products.**

**(a) Restaurants, Hotels, Boarding Houses, Soda Fountains, and Similar Establishments.**

**(1) Definitions.**

(A) Boarding House. The term “boarding house” as used in this regulation means any establishment regularly serving meals, on the average to five or more paying guests. The term includes a “guest home,” “residential care home,” “halfway house,” and any other establishment providing room and board or board only, which is not an institution as defined in Regulation 1503 and section 6363.6 of the Revenue and Taxation Code. The fact that guests may be recipients of welfare funds does not affect the application of tax. A person or establishment furnishing meals on the average to fewer than five paying guests during the calendar quarter is not considered to be engaged in the business of selling meals at retail.

(B) American Plan Hotel. The term “American Plan Hotel” as used in this regulation means a hotel which charges guests a fixed sum by the day, week, or other period for room and meals combined.

(C) Complimentary Food and Beverages. As used in this subdivision (a), the term “complimentary food and beverages” means food and beverages (including alcoholic and non-alcoholic beverages) which are provided to transient guests on a complimentary basis and:

1. There is no segregation between the charges for rooms and the charges for the food and beverages on the guests’ bills, and
2. The guests are not given an option to refuse the food and beverages in return for a discounted room rental.

(D) Average Retail Value of Complimentary Food and Beverages. The term “average retail value of complimentary food and beverages” (ARV) as used in this regulation means the total amount of the costs of the complimentary food and beverages for the preceding calendar year marked-up one hundred percent (100%) and divided by the number of rooms rented for that year. Costs of complimentary food and beverages include charges for delivery to the lodging establishment but exclude discounts taken and sales tax reimbursement paid to vendors. The 100% markup factor includes the cost of food preparation labor by hotel employees, the fair rental value of hotel facilities used to prepare or serve the food and beverages, and profit.

(E) Average Daily Rate. The term “average daily rate” (ADR) as used in this regulation means the gross room revenue for the preceding calendar year divided by the number of rooms rented for that year. “Gross room revenue” means and includes the full charge to the hotel customers but excludes separately stated occupancy taxes, revenue from

contract and group rentals which do not qualify for complimentary food and beverages, and revenue from special packages (e.g., New Year's Eve packages which include food and beverages as well as guest room accommodations), unless it can be documented that the retail value of the food and beverages provided as a part of the special package is 10% or less of the total package charge as provided in subdivision (a)(2)(B). "Number of rooms rented for that year" means the total number of times all rooms have been rented on a nightly basis provided the revenue for those rooms is included in the "gross room revenue". For example, if a room is rented out for three consecutive nights by one guest, that room will be counted as rented three times when computing the ADR.

## (2) Application Of Tax.

(A) In General. Tax applies to sales of meals or hot prepared food products (see (e) below) furnished by restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments whether served on or off the premises. In the case of American Plan hotels, special packages offered by hotels, e.g., a New Year's Eve package as described in subdivision (a)(1)(E), and boarding houses, a reasonable segregation must be made between the charges for rooms and the charges for the meals, hot prepared food products, and beverages. Charges by hotels or boarding houses for delivering meals or hot prepared food products to, or serving them in, the rooms of guests are includable in the measure of tax on the sales of the meals or hot prepared food products whether or not the charges are separately stated. (Caterers, see (h) below.) Sales of meals or hot prepared food products by restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments to persons such as event planners, party coordinators, or fundraisers, which buy and sell on their own account, are sales for resale for which a resale certificate may be accepted (see subdivision (h)(3)(C)2.)

Souffle cups, straws, paper napkins, toothpicks and like items that are not of a reusable character which are furnished with meals or hot prepared food products are sold with the meals or hot prepared food products. Sales of such items for such purpose to persons engaged in the business of selling meals or hot prepared food products are, accordingly, sales for resale.

(B) Complimentary Food and Beverages. Lodging establishments which furnish, prepare, or serve complimentary food and beverages to guests in connection with the rental of rooms are consumers and not retailers of such food and beverages when the retail value of the complimentary food and beverages is "incidental" to the room rental service regardless of where within the hotel premises the complimentary food and beverages are served. For complimentary food and beverages to qualify as "incidental" for the current calendar year, the average retail value of the complimentary food and beverages (ARV) furnished for the preceding calendar year must be equal to or less than 10% of the average daily rate (ADR) for that year.

If a hotel provides guests with coupons or similar documents which may be exchanged for complimentary food and beverages in an area of the hotel where food and beverages are sold on a regular basis to the general public (e.g., a restaurant), the hotel will be

considered the consumer and not the retailer of such food and beverages if the coupons or similar documents are non-transferable and the guest is specifically identified by name. If the coupons or similar documents are transferable or the guest is not specifically identified, food and beverages provided will be considered sold to the guest at the fair retail value of similar food and beverages sold to the general public. In the case of coupons redeemed by guests at restaurants not operated by the lodging establishment, the hotel will be considered the consumer of food and beverages provided to the hotel's guests and tax will apply to the charge by the restaurant to the hotel.

Lodging establishments are retailers of food and beverages which do not qualify as "incidental" and tax applies as provided in subdivision (a)(2)(A) above. Amounts paid by guests for food and beverages in excess of a complimentary allowance are gross receipts subject to the tax. Lodging establishments are retailers of otherwise complimentary food and beverages sold to non-guests.

In the case of hotels with concierge floor, club level or similar programs, the formula set forth above shall be applied separately with respect to the complimentary food and beverages furnished to guests who participate in the concierge, club or similar program. That is, the concierge, club or similar program will be deemed to be an independent hotel separate and apart from the hotel in which it is operated. The ADR and the retail value of complimentary food and beverages per occupied room will be computed separately with respect to the guest room accommodations entitled to the privileges and amenities involved in the concierge, club or similar program.

The following example illustrates the steps in determining whether the food and beverages are complimentary:

FORMULA:	$ARV/ADR3 < \text{or} = 10\%$
Average Daily Rate (ADR):	
Room Revenue	\$9,108,000
Rooms Rented	74,607
ADR (\$9,108,000/74,607)	\$122.08
Average Retail Value of Complimentary Food and Beverages (ARV):	
Complimentary Food Cost	\$169,057
Complimentary Beverage Cost	52,513
Total	\$221,570
Add 100% Markup	221,570
Average Retail Value	\$443,140
ARV per occupied room (\$443,140/74,607)	\$5.94
Application of Formula:	$\$5.94/\$122.08 = 4.87\%$

In the above example, the average retail value of the complimentary food and beverages per occupied room for the preceding calendar year is equal to or less than 10% of the average daily rate. Therefore, under the provisions of this subdivision (a)(2)(B), the complimentary food and beverages provided to guests for the current calendar year



qualify as “incidental”. The lodging establishment is the consumer and not the retailer of such food and beverages. This computation must be made annually.

When a lodging establishment consists of more than one location, the operations of each location will be considered separately in determining if that location’s complimentary food and beverages qualify as incidental.

(C) “Free” Meals. When a restaurant agrees to furnish a “free” meal to a customer who purchases another meal and presents a coupon or card, which the customer previously had purchased directly from the restaurant or through a sales promotional agency having a contract with the restaurant to redeem the coupons or cards, the restaurant is regarded as selling two meals for the price of one, plus any additional compensation from the agency or from its own sales of coupons. Any such additional compensation is a part of its taxable gross receipts for the period in which the meals are served.

Tax applies only to the price of the paid meal plus any such additional compensation.

(b) “Drive-Ins.” Tax applies to sales of food products ordinarily sold for immediate consumption on or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the “drive-in” establishment, even though such products are sold on a “take out” or “to go” order and are actually packaged or wrapped and taken from the premises of the retailer. Food products when sold in bulk, i.e., in quantities or in a form not suitable for consumption on the retailer’s premises, are not regarded as ordinarily sold for immediate consumption on or near the location at which parking facilities are provided by the retailer. Accordingly, with the exception of sales of hot prepared food products (see (e) below) and sales of cold food under the 80-80 rule (see (c) below), sales of ice cream, doughnuts, and other individual food items in quantities obviously not intended for consumption on the retailer’s premises, without eating utensils, trays, or dishes and not consumed on the retailer’s premises, are exempt from tax. Any retailer claiming a deduction on account of food sales of this type must support the deduction by complete and detailed records.<sup>1</sup>

(c) Cold Food Sold on a “Take-Out” Order.

(1) General.

(A) Seller Meeting Criteria of 80-80 Rule. When a seller meets both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax applies to sales of cold food products (including sales for a separate price of hot bakery goods and hot beverages such as coffee) in a form suitable for consumption on the seller’s premises even though such food products are sold on a “take-out” or “to go” order. Sales of cold food products which are suitable for consumption on the seller’s premises are subject to the tax no matter how great the quantity purchased, e.g., 40 one-half pint containers of milk. Except as provided elsewhere in this regulation, tax does not apply to sales of food products which are furnished in a form not suitable for consumption on the seller’s premises.

Operative April 1, 1996, although a seller may meet both criteria of the 80-80 rule, he or she may elect to separately account for the sale of “take-out” or “to go” orders of cold food products which are in a form suitable for consumption on the seller’s premises. The gross receipts from the sale of those food products shall be exempt from the tax provided the seller keeps a separate accounting of these transactions in his or her records. Tax will remain applicable to the sale of food products as provided in subdivisions (a), (b), (e), or (f) of this regulation. Failure to maintain the required separate accounting and documentation claimed as exempt under this subdivision will revoke the seller’s election under this subdivision.

(B) Seller Not Meeting Criteria of 80-80 Rule. When a seller does not meet both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax does not apply to sales of cold food products (including sales for a separate price of hot bakery goods and hot beverages such as coffee) when sold on a “take-out” or “to go” order.

## (2) Definitions.

(A) For purposes of this subdivision (c), the term “suitable for consumption on the seller’s premises” means food products furnished:

1. In a form which requires no further processing by the purchaser, including but not limited to cooking, heating, thawing, or slicing, and
2. In a size which ordinarily may be immediately consumed by one person such as a large milk shake, a pint of ice cream, a pint of milk, or a slice of pie. Cold food products (excluding milk shakes and similar milk products) furnished in containers larger in size than a pint are considered to be in a form not suitable for immediate consumption.

Pieces of candy sold in bulk quantities of one pound or greater are deemed to be sold in a form not suitable for consumption on the seller’s premises.

The term does not include cold food products which obviously would not be consumed on the premises of the seller, e.g., a cold party tray or a whole cold chicken.

(B) For purposes of this subdivision (c), the term “seller’s premises” means the individual location at which a sale takes place rather than the aggregate of all locations of the seller. For example, if a seller operates several drive-in and fast food restaurants, the operations of each location stand alone and are considered separately in determining if the sales of food products at each location meet the criteria of the 80-80 rule.

When two or more food-selling activities are conducted by the same person at the same location, the operations of all food related activities will be considered in determining if the sales of food products meet the criteria of the 80-80 rule. For example, if a seller operates a grocery store and a restaurant with no physical separation other than separate cash registers, the grocery store operations will be included in determining if the sales of

food products meet the criteria of the 80-80 rule. When there is a physical separation where customers of one operation may not pass freely into the other operation, e.g., separate rooms with separate entrances but a common kitchen, each operation will be considered separately for purposes of this subdivision (c).

(3) 80-80 Rule. Tax applies under this subdivision (c) only if the seller meets both of the following criteria:

(A) More than 80 percent of the seller's gross receipts are from the sale of food products, and

(B) More than 80 percent of the seller's retail sales of food products are taxable as provided in subdivisions (a), (b), (e), and (f) of this regulation.

Sales of alcoholic beverages, carbonated beverages, or cold food to go not suitable for immediate consumption should not be included in this computation. Any seller meeting both of these criteria and claiming a deduction for the sale of cold food products in a form not suitable for consumption on the seller's premises must support the deduction by complete and detailed records of such sales made.

(d) Places Where Admission Is Charged.

(1) General. Tax applies to sales of food products when sold within, and for consumption within, a place the entrance to which is subject to an admission charge, during the period when the sales are made, except for national and state parks and monuments, and marinas, campgrounds, and recreational vehicle parks.

(2) Definitions.

(A) "Place" means an area the exterior boundaries of which are defined by walls, fences or otherwise in such a manner that the area readily can be recognized and distinguished from adjoining or surrounding property. Examples include buildings, fenced enclosures and areas delimited by posted signs.

(B) "Within a place" means inside the door, gate, turnstile, or other point at which the customer must pay an admission charge or present evidence, such as a ticket, that an admission charge has been paid. Adjacent to, or in close proximity to, a place is not within a place.

(C) "Admission charge" means any consideration required to be paid in money or otherwise, for admittance to a place.

"Admission charge" does not include:

1. Membership dues in a club or other organization entitling the member to, among other things, entrance to a place maintained by the club or organization, such as a

fenced area containing a club house, tennis courts, and a swimming pool. Where a guest is admitted to such a place only when accompanied by or vouched for by a member of the club or organization, any charge made to the guest for use of facilities in the place is not an admission charge.

2. A charge for a student body card entitling the student to, among other things, entrance to a place, such as entrance to a school auditorium at which a dance is held.

3. A charge for the use of facilities within a place to which no entrance charge is made to spectators. For example, green fees paid for the privilege of playing a golf course, a charge made to swimmers for the use of a pool within a place, or a charge made for the use of lanes in a public bowling place.

(D) "National and state parks and monuments" means those which are part of the National Park System or the State Park System. The phrase does not include parks and monuments not within either of those systems, such as city, county, regional, district or private parks.

(3) Presumption That Food Is Sold for Consumption Within a Place.

When food products are sold within a place the entrance to which is subject to an admission charge, it will be presumed, in the absence of evidence to the contrary, that the food products are sold for consumption within the place. Obtaining and retaining evidence in support of the claimed tax exemption is the responsibility of the retailer. Such evidence may consist, for example, of proof that the sales were of canned jams, cake mixes, spices, cooking chocolate, or other items in a form in which it is unlikely that such items would be consumed within the place where sold.

(4) Food Sold to Students. The exemption otherwise granted by Section 6363 does not apply to sales of food products to students when sold within, and for consumption within, a place the entrance to which is subject to an admission charge, and such sales are subject to tax except as provided in (p) of this regulation. For example, when food products are sold by a student organization to students or to both students and nonstudents within a place the entrance to which is subject to an admission charge, such as a place where school athletic events are held, the sales to both students and nonstudents are taxable.

(e) Hot Prepared Food Products.

(1) General. Tax applies to all sales of hot prepared food products unless otherwise exempt. "Hot prepared food products" means those products, items, or components which have been prepared for sale in a heated condition and which are sold at any temperature which is higher than the air temperature of the room or place where they are sold. The mere heating of a food product constitutes preparation of a hot prepared food product, e.g., grilling a sandwich, dipping a sandwich bun in hot gravy, using infra-red lights, steam tables, etc.. If the sale is intended to be of a hot food product, such sale is of a hot food product regardless of cooling which incidentally occurs. For example, the sale of a toasted sandwich intended to be in a

heated condition when sold, such as a fried ham sandwich on toast, is a sale of a hot prepared food product even though it may have cooled due to delay. On the other hand, the sale of a toasted sandwich which is not intended to be in a heated condition when sold, such as a cold tuna sandwich on toast, is not a sale of a hot prepared food product.

When a single price has been established for a combination of hot and cold food items, such as a meal or dinner which includes cold components or side items, tax applies to the entire established price regardless of itemization on the sales check. The inclusion of any hot food product in an otherwise cold combination of food products sold for a single established price, results in the tax applying to the entire established price, e.g., hot coffee served with a meal consisting of cold food products, when the coffee is included in the established price of the meal. If a single price for the combination of hot and cold food items is listed on a menu, wall sign or is otherwise advertised, a single price has been established. Except as otherwise provided in (b), (c), (d) or (f) of this regulation, or in Regulation 1574, tax does not apply to the sale for a separate price of bakery goods, beverages classed as food products, or cold or frozen food products. Hot bakery goods and hot beverages such as coffee are hot prepared food products but their sale for a separate price is exempt unless taxable as provided in (b), (c), (d) or (f) of this regulation, or in Regulation 1574. Tax does apply if a hot beverage and a bakery product or cold food product are sold as a combination for a single price. Hot soup, bouillon, or consomme is a hot prepared food product, which is not a beverage.

(2) Air Carriers Engaged in Interstate or Foreign Commerce. Tax does not apply to the sale, storage, use, or other consumption of hot prepared food products sold by caterers or other vendors to air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers, nor to the sale, storage, use, or other consumption of hot prepared food products sold or served to passengers by air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers. "Air carriers" are persons or firms in the business of transporting persons or property for hire or compensation, and include both common and contract carriers. "Passengers" do not include crew members. Any caterer or other vendor claiming the exemption must support it with an exemption certificate from the air carrier substantially in the form prescribed in Appendix A of this regulation.

(f) Food for Consumption at Facilities Provided by the Retailer. Tax applies to sales of sandwiches, ice cream, and other foods sold in a form for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others.

A passenger's seat aboard a train, or a spectator's seat at a game, show, or similar event is not a "chair" within the meaning of this regulation. Accordingly, except as otherwise provided in (c), (d), and (e) above, tax does not apply to the sale of cold sandwiches, ice cream, or other food products sold by vendors passing among the passengers or spectators where the food products are not "for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer."

(g) Tips, Gratuities, and Service Charges.

This subdivision applies to restaurants, hotels, caterers, boarding houses, soda fountains, drive-ins and similar establishments.

An optional payment designated as a tip, gratuity, or service charge is not subject to tax. A mandatory payment designated as a tip, gratuity, or service charge is included in taxable gross receipts, even if the amount is subsequently paid by the retailer to employees.

(1) Optional Payment.

(A) A payment of a tip, gratuity, or service charge is optional if the customer adds the amount to the bill presented by the retailer, or otherwise leaves a separate amount in payment over and above the actual amount due the retailer for the sale of meals, food, and drinks that include services. The following examples illustrate transactions where a payment of a tip, gratuity or service charge is optional and not included in taxable gross receipts. This is true regardless of printed statements on menus, brochures, advertisements or other materials notifying customers that tips, gratuities, or service charges will or may be added by the retailer to the prices of meals, food, or drinks:

Example 1. The restaurant check is presented to the customer with the “tip” area blank so the customer may voluntarily write in an amount, or

Example 2. The restaurant check is presented to the customer with options computed by the retailer and presented to the customer as tip suggestions. The “tip” area is blank so the customer may voluntarily write in an amount:

Guest Check	
Food Item A	\$9.95
Beverage Item B	3.75
Subtotal	\$13.70
8% sales tax	1.10
Subtotal	\$14.80
Tip*	
Total	

\*Suggested tips:

15%=\$2.06; 18%=\$2.47; 20%=\$2.74; other.

If an employer misappropriates these payments for these charges, as discussed in subdivision (g)(1)(B) below, such payments are included in the retailer’s taxable gross receipts.

(B) No employer shall collect, take, or receive any gratuity or a part thereof, paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of such gratuity, or require an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer. (Labor Code section 351.) If this prohibition is violated, any amount

of such gratuities received by the employer will be considered a part of the gross receipts of the employer and subject to the tax.

(2) Mandatory Payment.

(A) An amount negotiated between the retailer and the customer in advance of a meal, food, or drinks, or an event that includes a meal, food, or drinks is mandatory.

(B) When the menu, brochures, advertisements or other printed materials contain statements that notify customers that tips, gratuities, or service charges will or may be added, an amount automatically added by the retailer to the bill or invoice presented to and paid by the customer is a mandatory charge and subject to tax. These amounts are considered negotiated in advance as specified in subdivision (g)(2)(A). Examples of printed statements include:

“An 18% gratuity [or service charge] will be added to parties of 8 or more.”

“Suggested gratuity 15%,” itemized on the invoice or bill by the restaurant, hotel, caterer, boarding house, soda fountain, drive-in or similar establishment.

“A 15% voluntary gratuity will be added for parties of 8 or more.”

An amount will be considered “automatically added” when the retailer adds the tip to the bill without first conferring with the customer after service of the meal and receiving approval to add the tip or without providing the customer with the option to write in the tip. Nonetheless, any amount added by the retailer is presumed to be mandatory. This presumption may be overcome as discussed in subdivision (g)(2)(C) below.

(C) It is presumed that an amount added as a tip by the retailer to the bill or invoice presented to the customer is mandatory. A statement on the bill or invoice that the amount added by the retailer is a “suggested tip,” “optional gratuity,” or that “the amount may be increased, decreased, or removed” by the customer does not change the mandatory nature of the charge.

This presumption may be controverted by documentary evidence showing that the customer specifically requested and authorized the gratuity be added to the amount billed.

Examples of documentary evidence that may be used to overcome the presumption include:

1. A guest check that is presented to the customer showing sales tax reimbursement and the amount upon which it was computed, without tip or with the “tip” area blank and a separate document, such as a credit card receipt, to which the retailer adds or prints the requested tip.

2. Guests receipts and payments showing that the percentage of tips paid by large groups varies from the percentage stated on the menu, brochure, advertisement or other printed materials.

3. A retailer's written policy stating that its employees shall receive confirmation from a customer before adding a tip together with additional verifiable evidence that the policy has been enforced. The policy is not in itself sufficient documentation to establish that the customer requested and authorized that a gratuity be added to the amount billed without such additional verifiable evidence.

The retailer must retain the guest checks and any additional separate documents to show that the payment is optional. The retailer is also required to maintain other records in accordance with the requirements of Regulation 1698, Records.

(h) Caterers.

(1) Definition. The term "caterer" as used in this regulation means a person engaged in the business of serving meals, food, or drinks on the premises of the customer, or on premises supplied by the customer, including premises leased by the customer from a person other than the caterer, but does not include employees hired by the customer by the hour or day.

(2) Sales to Caterers. A caterer generally is considered to be the consumer of tangible personal property normally used in the furnishing and serving of meals, food or drinks, except for separately stated charges by the caterer for the lease of tangible personal property or tangible personal property regarded as being sold with meals, food or drinks such as disposable plates, napkins, utensils, glasses, cups, stemware, place mats, trays, covers and toothpicks.

(3) Sales by Caterers.

(A) Caterer as Retailer. Tax applies to the entire charge made by caterers for serving meals, food, and drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals, whether performed by the caterer, the caterer's employees or subcontractors. Tax applies to charges made by caterers for preparing and serving meals and drinks even though the food is not provided by the caterers. Tax applies to charges made by caterers for hot prepared food products as in (e) above whether or not served by the caterers. A caterer who separately states or itemizes charges for the lease of tangible personal property regardless of the use of the property will be deemed to be the lessor of such property. Tax applies in accordance with Regulation 1660 Leases of Tangible Personal Property - In General. Tax does not apply to charges made by caterers for the rental of dishes, silverware, glasses, etc., purchased by the caterer with tax paid on the purchase price if no food is provided or served by the caterers in connection with such rental.



**(B) Caterers as Lessors of Property Unrelated to the Serving or Furnishing of Meals, Food, or Drinks by a Caterer.**

1. When a caterer who is furnishing or serving meals, food, or drinks also rents or leases from a third party tangible personal property which the caterer does not use himself or herself and the property is not customarily provided or used within the catering industry in connection with the furnishing and serving of food or drinks, such as decorative props related solely to optional entertainment, special lighting for guest speakers, sound or video systems, dance floors, stages, etc., he or she is a lessor of such property. In such instance, tax applies to the lease in accordance with Regulation 1660.
2. When a person who in other instances is a caterer does not furnish or serve any meals, food, or drinks to a customer, but rents or leases from a third party tangible personal property such as dishes, linen, silverware and glasses, etc., for purposes of providing it to his or her customer, he or she is not acting as a caterer within the meaning of this regulation, but solely as a lessor of tangible personal property. In such instances tax applies to the lease in accordance with Regulation 1660.

**(C) Caterers Planning, Designing and Coordinating Events.**

1. Tax applies to charges by a caterer for event planning, design, coordination, and/or supervision if they are made in connection with the furnishing of meals, food, or drinks for the event. Tax does not apply to separately stated charges for services unrelated to the furnishing and serving of meals, food, or drinks, such as optional entertainment or any staff who do not directly participate in the preparation, furnishing, or serving of meals, food, or drinks, e.g., coat-check clerks, parking attendants, security guards, etc.
2. When a caterer sells meals, food, or drinks, and the serving of them, to other persons such as event planners, party coordinators, or fundraisers, who buy and sell the same on their own account or for their own sake, it is a sale for resale for which the caterer may accept a resale certificate. However, a caterer may only claim the sale as a resale if the caterer obtains a resale certificate in compliance with Regulation 1668. A person is buying or selling for his or her own account, or own sake, when such person has his or her own contract with a customer to sell the meals, food, or drinks to the customer, and is not merely acting on behalf of the caterer.
3. When a caterer sells meals, food or drinks and the serving of them to other persons who charge a fee for their service unrelated to the taxable sale, the separately stated fee is not subject to tax.

**(D) Sales of Meals by Caterers to Social Clubs, Fraternal Organizations. Sales of meals to social clubs and fraternal organizations, as those terms are defined in subdivision (i) below, by caterers are sales for resale if such social clubs and fraternal organizations are**

the retailers of the meals subject to tax under subdivision (i) and give valid resale certificates therefor.

(E) Tips, Gratuities, or Service Charges. Tips, gratuities, and service charges are discussed in subdivision (g).

(4) Premises. General. Separately stated charges for the lease of premises on which meals, food, or drinks are served, are nontaxable leases of real property. Where a charge for leased premises is a guarantee against a minimum purchase of meals, food or drinks, the charge for the guarantee is gross receipts subject to tax. Where a person contracts to provide both premises and meals, food or drinks, the charge for the meals, food or drinks must be reasonable in order for the charge for the premises to be non taxable.

(5) Private Chefs. A private chef is generally not an employee of the customer, but an independent contractor who pays his or her own social security, and federal and state income taxes. Such a private chef, who prepares and serves meals, food and drinks in the home of his or her customer is a caterer under this regulation.

(i) Social Clubs and Fraternal Organizations. "Social Clubs and Fraternal Organizations" as used herein include any corporation, partnership, association or group or combination acting as a unit, such as service clubs, lodges, and community, country, and athletic clubs.

The tax applies to receipts from the furnishing of meals, food, and drink by social clubs and fraternal organizations unless furnished: (1) exclusively to members; and also, (2) less frequently than once a week. Both these requirements must be met. If the club or organization furnishes meals, food or drink to nonmembers, all receipts from the furnishing of meals, food or drink are subject to tax whether furnished to members or nonmembers, including receipts on occasions when furnished exclusively to members. Meals, food or drink paid for by members are considered furnished to them even though consumed by guests who are not members.

(j) Student Meals.

(1) Definitions.

(A) "Food Products". As used herein, the term "food products" as defined in Regulation 1602 (18 CCR 1602) includes food furnished, prepared, or served for consumption at tables, chairs, or counters, or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare or serve food to others.

(B) "Meals". As used herein, the term "meals" includes both food and nonfood products which are sold to students for an established single price at a time set aside for meals. If a single price for the combination of a nonfood product and a food product is listed on a menu or on a sign, a single price has been established. The term "meals" does not include nonfood products which are sold to students for a separate price and tax applies to the sales of such products. Examples of nonfood products are: carbonated beverages and

beer. For the purpose of this regulation, products sold at a time designated as a “nutrition break”, “recess”, or similar break, will not be considered “meals”.

**(2) Application of Tax.**

(A) Sales by Schools, School Districts and Student Organizations. Sales of meals or food products for human consumption to students of a school by public or private schools, school districts, and student organizations are exempt from tax, except as otherwise provided in (d)(4) above.

(B) Sales by Parent-Teacher Associations. Tax does not apply to the sale of, nor the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served to the students of a school by parent-teacher associations. Parent-teacher associations qualifying under Regulation 1597 as consumers are not retailers of tangible personal property, which they sell. Accordingly, tax does apply to the sale to such associations of nonfood items such as carbonated beverages, containers, straws and napkins.

(C) Sales by Blind Vendors. Tax does not apply to the sale of meals or food products for human consumption to students of a school by any blind person (as defined in section 19153 of the Welfare and Institutions Code) operating a restaurant or vending stand in an educational institution under article 5 of chapter 6 of part 2 of division 10 of the Welfare and Institutions Code, except as otherwise provided in (d)(4) above.

(D) Sales by Caterers. The application of tax to sales by caterers in general is explained in subdivision (h) above. However, tax does not apply to the sale by caterers of meals or food products for human consumption to students of a school, if all the following criteria are met:

1. The premises used by the caterer to serve the lunches to the students are used by the school for other purposes, such as sporting events and other school activities, during the remainder of the day;
2. The fixtures and equipment used by the caterer are owned and maintained by the school; and
3. The students purchasing the meals cannot distinguish the caterer from the employees of the school.

**(k) Employees’ Meals.**

(1) In General. Any employer or employee organization that is in the business of selling meals, e.g., a restaurant, hotel, club, or association, must include its receipts from the sales of meals to employees, along with its receipts from sales to other purchasers of meals, in the amount upon which it computes its sales tax liability. An employer or an employee organization selling meals only to employees becomes a retailer of meals and liable for sales

tax upon its receipts from sales of meals if it sells meals to an average number of five or more employees during the calendar quarter.

(2) **Specific Charge.** The tax applies only if a specific charge is made to employees for the meals. Tax does not apply to cash paid an employee in lieu of meals. A specific charge is made for meals if:

- (A) Employee pays cash for meals consumed.
- (B) Value of meals is deducted from employee's wages.
- (C) Employee receives meals in lieu of cash to bring compensation up to legal minimum wage.
- (D) Employee has the option to receive cash for meals not consumed.

(3) **No Specific Charge.** If an employer makes no specific charge for meals consumed by employees, the employer is the consumer of the food products and the non-food products, which are furnished to the employees as a part of the meals.

In the absence of any of the conditions under (k) (2) a specific charge is not made if:

- (A) A value is assigned to meals as a means of reporting the fair market value of employees' meals pursuant to state and federal laws or regulations or union contracts.
- (B) Employees who do not consume available meals have no recourse on their employer for additional cash wages.
- (C) Meals are generally available to employees, but the duties of certain employees exclude them from receiving the meals and are paid cash in lieu thereof.

(4) **Meals Credited Toward Minimum Wage.** If an employee receives meals in lieu of cash to bring his or her compensation up to the legal minimum wage, the amount by which the minimum wage exceeds the amount otherwise paid to the employee is includable in the employer's taxable gross receipts up to the value of the meals credited toward the minimum wage.

For example, if the minimum rate for an eight-hour day is \$46.00, and the employee received \$43.90 in cash, and a lunch is received which is credited toward the minimum wage in the maximum allowable amount of \$2.10, the employer has received gross receipts in the amount of \$2.10 for the lunch.

(5) **Tax Reimbursement.** If a separately stated amount for tax reimbursement is not added to the price of meals sold to employees for which a specific charge is made, the specific charge will be regarded as being a tax-included charge for the meals.

(l) Religious Organizations. Tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served by any religious organization at a social or other gathering conducted by it or under its auspices, if the purpose in furnishing or serving the meals and food products is to obtain revenue for the functions and activities of the organization and the revenue obtained from furnishing or serving the meals and food products is actually used in carrying on such functions and activities. For the purposes of this regulation, “religious organization” means any organization the property of which is exempt from taxation pursuant to subdivision (f) of section 3 of article XIII of the State Constitution.

(m) Institutions. Tax does not apply to the sale of, nor the storage, use, or other consumption in this state of, meals and food products for human consumption furnished or served to and consumed by patients or residents of an “institution” as defined in Regulation 1503. Tax, however, does apply to the sale of meals and food products by an institution to persons other than patients or residents of the institution.

(n) Meal Programs for Low-Income Elderly Persons. Tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served to low-income elderly persons at or below cost by a nonprofit organization or governmental agency under a program funded by this state or the United States for such purposes.

(o) Food Products, Nonalcoholic Beverages and Other Tangible Personal Property Transferred by Nonprofit Youth Organizations. See Regulation 1597 for application of tax on food products, nonalcoholic beverages and other tangible personal property transferred by nonprofit youth organizations.

(p) Nonprofit Parent-Teacher Associations. Nonprofit parent-teacher associations and equivalent organizations qualifying under Regulation 1597 are consumers and not retailers of tangible personal property, which they sell.

(q) Meals and Food Products Served to Condominium Residents. Tax does not apply to the sale of and the storage, use, or other consumption in this state of meals and food products for human consumption furnished to and consumed by persons 62 years of age or older residing in a condominium and who own equal shares in a common kitchen facility; provided, that the meals and food products are served to such persons on a regular basis.

This exemption is applicable only to sales of meals and food products for human consumption prepared and served at the common kitchen facility of the condominium. Tax applies to sales to persons less than 62 years of age.

(r) Veteran’s Organization. Beginning April 1, 2004, tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served by any nonprofit veteran’s organization at a social or other gathering conducted by it or under its auspices, if the purpose in furnishing or serving the meals and food products is to obtain revenue for the functions and activities of the organization and the

revenue obtained from furnishing or serving the meals and food products is actually used in carrying on those functions and activities.

(s) Food Stamp Coupons. Tax does not apply to tangible personal property which is eligible to be purchased with federal food stamp coupons acquired pursuant to the Food Stamp Act of 1977 and so purchased. When payment is made in the form of both food stamps and cash, the amount of the food stamp coupons must be applied first to tangible personal property normally subject to the tax, e.g., nonalcoholic carbonated beverages. Retailers are prohibited from adding any amount designated as sales tax, use tax, or sales tax reimbursement to sales of tangible personal property purchased with food stamp coupons. (See paragraph (c) of Regulation 1602.5 for special reporting provisions by grocers.)

(t) Honor System Snack Sales. An “honor system snack sale” means a system where customers take snacks from a box or tray and pay by depositing money in a container provided by the seller. Snacks sold through such a system may be subject to tax depending upon where the sale takes place. Sales of such snacks are taxable when sold at or near a lunchroom, break room, or other facility that provides tables and chairs, and it is contemplated that the food sold will normally be consumed at such facilities. Honor system snack sales do not include hotel room mini-bars or snack baskets.

(u) Mobile Food Vendors. Mobile food vendors include retailers who sell food and beverages for immediate consumption from motorized vehicles or un-motorized carts. Examples of mobile food vendors include food trucks, coffee carts, and hot dog carts. For sales made on or after July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors’ sales of taxable items are presumed to be made on a tax-included basis.

This presumption does not apply when a mobile food vendor is making sales as a “caterer” as defined in (h)(1).

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1 The records acceptable in support of such a deduction are:

(a) A sales ticket prepared for each transaction claimed as being tax exempt showing:

- (1) Date of the sale,
- (2) The kind of merchandise sold,
- (3) The quantity of each kind of merchandise sold,
- (4) The price of each kind of merchandise sold,
- (5) The total price of merchandise sold,

(6) A statement to the effect that the merchandise purchased is not to be consumed on or near the location at which parking facilities are provided by the retailer, and

(b) A daily sales record kept in sufficient detail to permit verification by audit that all gross receipts from sales have been accounted for and that all sales claimed as being tax exempt are included therein.

## Appendix A

### California Sales Tax Exemption Certificate Supporting Exemption Under Section 6359.1

The undersigned certifies that it is an air carrier engaged in interstate or foreign commerce and that the hot prepared food products purchased from \_\_\_\_\_ will be consumed by passengers on its flights.

The undersigned further certifies that it understands and agrees that if the property purchased under this certificate is used by the purchaser for any purpose other than that specified above, the purchaser shall be liable for sales tax as if it were a retailer making a retail sale of the property at the time of such use, and the sales price of the property to it shall be deemed the gross receipts from such sale.

Date Certificate Given \_\_\_\_\_

Purchasing Air Carrier \_\_\_\_\_

(company name)

Address \_\_\_\_\_

Signed By \_\_\_\_\_

(signature of authorized person)

\_\_\_\_\_  
(print or type name)

Title \_\_\_\_\_

(owner, partner, purchasing agent, etc.)

Seller's Permit No. (if any) \_\_\_\_\_

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6006, 6012, 6359, 6359.1, 6359.45, 6361, 6363, 6363.5, 6363.6, 6363.8, 6370, 6373, 6374 and 6376.5, Revenue and Taxation Code. Food Products Generally, see Regulation 1602. Alcoholic Beverages, tax reimbursements when served with, see Regulation 1700. "Free" meals with purchased meals, see Regulation 1670. Meals served to patients and inmates of an institution, see Regulation 1503. Vending Machines, when considered selling meals, see Regulation 1574. Meals at summer camps, see Regulation 1506(e). Parent-Teacher associations as consumers, see Regulation 1597.



## Regulation History

**Type of Regulation:** Sales and Use Tax

Regulation: 1603

Title: 1603, *Taxable Sales of Food Products*

**Preparation:** Cary Huxsoll

**Legal Contact:** Cary Huxsoll

The proposed amendments to Regulation 1603, *Taxable Sales of Food Products*, provide that mobile food vendors' sales of items subject to tax, on or after July 1, 2014, are presumed to be made on a tax-included basis.

### History of Proposed Regulation:

March 25, 2014	Public Hearing
February 7, 2014	OAL publication date; 45-day public comment period begins; Interested Parties mailing
January 28, 2014	Notice to OAL
November 19, 2013	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor:	NA
Support:	NA
Oppose:	NA

## Statement of Compliance

The State Board of Equalization, in process of adopting Sales and Use Taxes Regulation 1603, *Taxable Sales of Food Products*, did comply with the provision of Government Code section 11346.4(a)(1) through (4). A notice to interested parties was mailed on February 7, 2014, 46 days prior to the public hearing.

March 25, 2014

A handwritten signature in black ink, appearing to read "Richard Bennion", written over a horizontal line.

Richard Bennion  
Regulations Coordinator  
State Board of Equalization

BEFORE THE CALIFORNIA STATE BOARD OF EQUALIZATION

505 VAN NESS AVENUE

SAN FRANCISCO, CALIFORNIA

REPORTER'S TRANSCRIPT

MARCH 25, 2014

F PUBLIC HEARINGS

F1 PROPOSED ADOPTION OF  
AMENDMENTS TO SALES AND USE TAX  
REGULATION 1603  
TAXABLE SALES OF FOOD PRODUCTS

Reported by: Juli Price Jackson

No. CSR 5214

P R E S E N T

For the Board  
of Equalization:

Jerome E. Horton  
Chairman

Michelle Steel  
Vice-Chairwoman

Betty T. Yee  
Member

George Runner  
Member

Marcy Jo Mandel  
Appearing for  
John Chiang,  
State Controller  
(per Government  
Code Section 7.9)

Joann Richmond  
Chief, Board  
Proceedings  
Division

For Staff:

Cary Huxsoll  
Tax Counsel III  
Legal Department

Bradley Heller  
Tax Counsel IV  
Legal Department

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505 VAN NESS AVENUE  
SAN FRANCISCO, CALIFORNIA  
MARCH 25, 2014

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MR. HORTON: Ms. Richmond, our next matter?

MS. RICHMOND: Our next item is item F,  
Public Hearings; F1, Proposed Adoption of Amendments  
to Sales and Use Tax Regulation 1603, Taxable Sales  
of Food Products.

MR. HORTON: Would the Department please  
introduce themselves for the record and the item as  
well?

MR. HUXSOLL: Good afternoon, Mr. Chairman,  
Members of the Board. I'm Cary Huxsoll from the  
Legal Department, along with Bradley Heller from the  
Legal Department.

We request the Board vote to adopt proposed  
amendments to Regulation 1603, taxable sales of food  
products.

The proposed -- the proposed amendments  
provide that for sales made on or after July 1st,  
2014, mobile vendor sales of taxable items are  
presumed to be made on a tax included basis.

Staff has not received any public comments  
on these proposed amendments.

MR. HORTON: Is there a motion?  
Discussion?

MS. STEEL: I'll just make one comment.

1           Thank you very much for all the Members  
2   that, you know, supported for this change.

3           And thank you very much, Mr. Huxsoll, for  
4   working hard on this. And, you know, we heard --  
5   I've been hearing for so much -- for so many  
6   complaints from the catering truck operators for  
7   last seven years. And, finally, something's done to  
8   help them.

9           So, thank you. And, so moved.

10          MR. HORTON: It's been moved by Member Yee  
11   to adopt staff recommendations and second by  
12   Member -- moved by Member Steel, my apologies,  
13   second by Member Yee.

14          Without objection, such will be the order.  
15   We would also direct staff to put forth some effort  
16   to communicate this to the community.

17          Possibly through our Customer Service  
18   Committee we can get this word out.

19          MR. RUNNER: Question on that.

20          When we e-reg a business like that that's  
21   there's a food truck, is there a breakdown in terms  
22   of that kind of a business?

23          MR. HUXSOLL: I'm not sure.

24          I know we do, as part of getting the  
25   information out there, we have NAIC codes on file.  
26   And, so, we're planning on sending out the special  
27   notice once approval is done to the businesses that  
28   are registered as mobile food vendors.

1 I'm not sure --

2 MR. RUNNER: Okay.

3 MR. HUXSOLL: -- what the e-reg process is.

4 MR. RUNNER: Okay, thanks.

5 MR. HORTON: Thank you.

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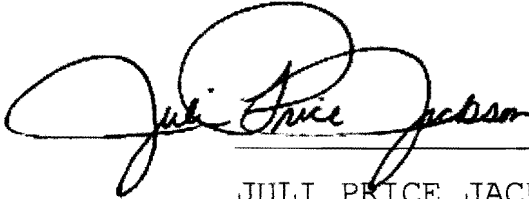

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1 REPORTER'S CERTIFICATE.  
2

3 State of California )  
4 ) ss  
5 County of Sacramento )  
6

7 I, JULI PRICE JACKSON, Hearing Reporter for  
8 the California State Board of Equalization certify  
9 that on MARCH 25, 2014 I recorded verbatim, in  
10 shorthand, to the best of my ability, the  
11 proceedings in the above-entitled hearing; that I  
12 transcribed the shorthand writing into typewriting;  
13 and that the preceding pages 1 through 5 constitute  
14 a complete and accurate transcription of the  
15 shorthand writing.  
16

17 Dated: APRIL 3, 2014  
18

19   
20 

21 JULI PRICE JACKSON

22 Hearing Reporter  
23  
24  
25  
26  
27  
28



**2014 MINUTES OF THE STATE BOARD OF EQUALIZATION****Tuesday, March 25, 2014****[C] SALES AND USE TAX APPEALS HEARING****C1. Loucas Savvas Kakoullis, 571124 (CH)**

07/01/07 to 06/30/10, \$204,336.00 Unreported Taxable Sales, \$1,894.00 Negligence Penalty

For Petitioner: Loucas Savvas Kakoullis, Taxpayer

For Sales and Use Tax Department: Scott Lambert, Hearing Representative

Contribution Disclosures pursuant to Government Code section 15626: None were disclosed.

Issues: Whether adjustments are warranted to the amount of unreported taxable sales.  
Whether petitioner was negligent..

Action: Upon motion of Ms. Yee, seconded by Ms. Steel and unanimously carried, Mr. Horton, Ms. Steel, Ms. Yee, Mr. Runner and Ms. Mandel voting yes, the Board ordered that the petition be submitted for decision.

**PUBLIC HEARINGS****F1 Proposed Amendments to Sales and Use Tax Regulation 1603, *Taxable Sales of Food Products***Mr. Huxsoll, Tax Counsel, Tax and Fee Programs Division, Legal Department, made introductory remarks regarding the amendments to Sales and Use Tax Regulation 1603, *Taxable Sales of Food Products* (Exhibit 3.2).Action: Upon motion of Ms. Steel, seconded by Ms. Yee and unanimously carried, Mr. Horton, Ms. Steel, Ms. Yee, Mr. Runner and Ms. Mandel voting yes, the Board adopted the amendments to Sales and Use Tax Regulation 1603, *Taxable Sales of Food Products* as recommended.**F2 Proposed Amendments to Sales and Use Tax Regulation 1699, *Permits***Ms. Dendorfer, Tax Counsel, Tax and Fee Programs Division, made introductory remarks regarding the amendments to Sales and Use Tax Regulation 1699, *Permits* (Exhibit 3.3).Action: Upon motion of Ms. Yee, seconded by Ms. Steel and unanimously carried, Mr. Horton, Ms. Steel, Ms. Yee, Mr. Runner and Ms. Mandel voting yes, the Board adopted amendments to Regulation 1699, *Permits* as recommended by staff.**[G1] LEGAL APPEALS MATTERS, CONSENT**

With respect to the Legal Appeals Matters Consent Agenda, upon a single motion of Mr. Runner, seconded by Ms. Steel and unanimously carried, Mr. Horton, Ms. Steel, Ms. Yee, Mr. Runner and Ms. Mandel voting yes, the Board made the following orders:



STATE OF CALIFORNIA

**STATE BOARD OF EQUALIZATION**

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BETTY T. YEE  
First District, San Francisco

SEN. GEORGE RUNNER (RET.)  
Second District, Lancaster

MICHELLE STEEL  
Third District, Rolling Hills Estates

JEROME E. HORTON  
Fourth District, Los Angeles

JOHN CHIANG  
State Controller

CYNTHIA BRIDGES  
Executive Director

February 7, 2014

To Interested Parties:

**Notice of Proposed Regulatory Action**

**The State Board of Equalization Proposes to Adopt Amendments to  
California Code of Regulations, Title 18,  
Section 1603, *Taxable Sales of Food Products***

**NOTICE IS HEREBY GIVEN**

The State Board of Equalization (Board), pursuant to the authority vested in it by Revenue and Taxation Code (RTC) section 7051, proposes to adopt amendments to California Code of Regulations, title 18, section (Regulation) 1603, *Taxable Sales of Food Products*. The proposed amendments add subdivision (u) to the regulation to describe the term “mobile food vendors,” provide that, “[f]or sales made on and after July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors’ sales of taxable items are presumed to be made on a tax included basis,” and provide that the “presumption does not apply when a mobile food vendor is making sales as a ‘caterer’ as defined in” subdivision (h)(1) of the regulation. The proposed amendments are intended to make the regulation consistent with the current practice in the mobile food industry, which is for mobile food vendors to include sales tax reimbursement in their menu prices.

**PUBLIC HEARING**

The Board will conduct a meeting in the Auditorium Room, at the California Public Utilities Commission’s headquarters, located at 505 Van Ness Avenue, San Francisco, California, on March 25, 2014. The Board will provide notice of the meeting to any person who requests that notice in writing and make the notice, including the specific agenda for the meeting, available on the Board’s Website at [www.boe.ca.gov](http://www.boe.ca.gov) at least 10 days in advance of the meeting.

A public hearing regarding the proposed regulatory action will be held at 10:00 a.m. or as soon thereafter as the matter may be heard on March 25, 2014. At the hearing, any interested person

may present or submit oral or written statements, arguments, or contentions regarding the adoption of the proposed amendments to Regulation 1603.

## **AUTHORITY**

RTC section 7051

## **REFERENCE**

RTC sections 6006, 6012, 6359, 6359.1, 6359.45, 6361, 6363, 6363.5, 6363.6, 6363.8, 6370, 6373, 6374, and 6376.5.

## **INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW**

### Current Law

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (RTC § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (RTC §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers.

Civil Code section 1656.1 provides that whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. The sales tax reimbursement may be shown as a separately stated amount added to the stated sales price of the tangible personal property or the sales tax reimbursement may be included in the total price charged for tangible personal property. Under Civil Code section 1656.1, it shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property if the retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable.

Regulation 1700 contains a general presumption that taxable tangible personal property is sold at a price which includes tax reimbursement if the retailer posts a specified sign to that effect.

In 2001, Regulation 1574, *Vending Machine Operators*, was amended to delete the specific requirement that vending machine operators post a sign providing that their sales are made on a tax-included basis and to instead provide that sales of tangible personal property through vending machines are presumed to be made on a tax-included basis notwithstanding the fact that the signage discussed in Civil Code section 1656.1 is not present. The amendments were based on the nature of the vending machine industry and the expectation from customers purchasing items through vending machines that all taxable sales are made on a tax-included basis.

Effect, Objective, and Benefits of the Proposed Amendments to Regulation 1603

Mobile food vendors sell food for immediate consumption from motorized vehicles, such as food trucks, or un-motorized carts, such as hot dog carts. Mobile food vendors do not generally have point of sale systems to calculate tax on individual transactions. Additionally, they often make sales in multiple tax districts in a given day and as a result, their sales are often subject to varying tax rates. Therefore, similar to vending machine operators, whose sales are discussed in Regulation 1574, it is common practice in the mobile food industry for mobile food vendors to make sales on a tax-included basis and to round their menu prices to the nearest quarter or dollar. And, similar to the vending machine operators, mobile food vendors intend for the prices that they charge for the meals that they sell to include all applicable taxes, and their customers expect that amounts for sales tax reimbursement are included in the prices charged by the mobile food vendors.

While the industry practice is for mobile food vendors to include sales tax reimbursement in their menu prices, during recent audits, many mobile food vendors did not have a sign posted stating that tax reimbursement was included in their menu prices.

*Interested Parties Process*

The Board's Business Taxes Committee (BTC) staff drafted amendments adding a new subdivision (u) to Regulation 1603 to address the mobile food vendors' signage issue. The draft amendments suggested adding provisions to the regulation to describe the term "mobile food vendors" by providing that mobile food vendors include retailers who sell food and beverage for immediate consumption from motorized vehicles or un-motorized carts, and provide that mobile food vendors include vendors operating food trucks, coffee carts, and hot dog carts. The draft amendments also provided that effective July 1, 2014, sales by mobile food vendors are presumed to be made on a tax-included basis, unless a separate amount for tax reimbursement is added to the price. And, the draft amendments provided that this presumption does not apply when a mobile food vendor is making sales as a "caterer" as defined in subdivision (h)(1) of Regulation 1603.

BTC staff subsequently provided its draft amendments to Regulation 1603 to the interested parties and conducted an interested parties meeting in August 2013, to discuss the draft amendments. During the August meeting, participants discussed the effect of the presumption and asked BTC staff whether the new presumption might have some unintended effects, such as:

- Making it more likely for a person to be held personally liable for sales tax liabilities owed by its mobile food vending business under RTC section 6829;
- Making it more likely for a mobile food vendor to receive the 40 percent penalty imposed under RTC section 6597; and
- Potentially restricting mobile food vendors' participation in the Board's Offers in Compromise Program under RTC section 7093.6.

However, as explained in more detail in the initial statement of reasons, BTC staff determined that the potential effect of the new presumption was limited, particularly because the presumption may be overcome. And, BTC staff indicated that it was not necessary to revise the proposed amendments to Regulation 1603 to address the interested parties' questions because the new presumption, by itself, would not result in personal liability under RTC section 6829 or the imposition of the 40 percent penalty under RTC section 6597, and would not prevent a mobile food vendor from participating in the Offers in Compromise Program.

Following the interested parties meeting, other Board staff recommended that new subdivision (u) be revised to remove the language indicating that the new presumption will be "[e]ffective July 1, 2014" and instead include new language stating that it will apply to "[s]ales made on or after July 1, 2014." BTC staff agreed that the changes would make the application of the new presumption more clear and revised the draft amendments to the regulation, accordingly.

*November 19, 2013, BTC Meeting*

Subsequently, BTC staff prepared Formal Issue Paper 13-009 and distributed it to the Board Members for consideration at the Board's November 19, 2013, BTC meeting. Formal Issue Paper 13-009 recommended that the Board propose to add new subdivision (u) to Regulation 1603 which generally describes "mobile food vendors," and provides that, "[f]or sales made on and after July 1, 2014, unless a separate amount for tax reimbursement is added to the price of meals, a mobile food vendors' sales of taxable items are presumed to be made on a tax included basis," and provide that "[t]his presumption does not apply when a mobile food vendor is making sales as a 'caterer'" as defined in subdivision (h)(1) of Regulation 1603.

At the conclusion of the Board's discussion of Formal Issue Paper 13-009 during the November 19, 2013, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1603 recommended in the formal issue paper.

The Board anticipates that the proposed amendments to Regulation 1603 will promote fairness and benefit taxpayers, Board staff, and the Board by providing regulatory provisions consistent with industry practice and the understanding of mobile food vendors and their customers that mobile food vendors' sales are made on a tax-included basis.

The Board has performed an evaluation of whether the proposed amendments to Regulation 1603 are inconsistent or incompatible with existing state regulations and determined that the proposed amendments are not inconsistent or incompatible with existing state regulations. This is because the proposed amendments to Regulation 1603 are consistent with the 2001 amendments to Regulation 1574, discussed above, and there are no other sales and use tax regulations that specifically apply to mobile food vendors' collection of sales tax reimbursement. In addition, the Board has determined that there are no comparable federal regulations or statutes to Regulation 1603 or the proposed amendments to Regulation 1603.

### **NO MANDATE ON LOCAL AGENCIES AND SCHOOL DISTRICTS**

The Board has determined that the adoption of the proposed amendments to Regulation 1603 will not impose a mandate on local agencies or school districts, including a mandate that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code.

### **NO COST OR SAVINGS TO STATE AGENCIES, LOCAL AGENCIES, AND SCHOOL DISTRICTS**

The Board has determined that the adoption of the proposed amendments to Regulation 1603 will result in no direct or indirect cost or savings to any state agency, any cost to local agencies or school districts that is required to be reimbursed under part 7 (commencing with section 17500) of division 4 of title 2 of the Government Code, other non-discretionary cost or savings imposed on local agencies, or cost or savings in federal funding to the State of California.

### **NO SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESS**

The Board has made an initial determination that the adoption of the proposed amendments to Regulation 1603 will not have a significant, statewide adverse economic impact directly affecting business, including the ability of California businesses to compete with businesses in other states.

The adoption of the proposed amendments to Regulation 1603 may affect small business.

### **NO COST IMPACTS TO PRIVATE PERSONS OR BUSINESSES**

The Board is not aware of any cost impacts that a representative private person or business would necessarily incur in reasonable compliance with the proposed action.

### **RESULTS OF THE ECONOMIC IMPACT ASSESSMENT REQUIRED BY GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)**

The Board has determined that the proposed amendments to Regulation 1603 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000. Therefore, the Board has prepared the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1), and included it in the initial statement of reasons. The Board has determined that the adoption of the proposed amendments to Regulation 1603 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California. Furthermore, the Board has determined that the adoption of the proposed amendments to Regulation 1603 will not affect the benefits of Regulation 1603 to the health and welfare of California residents, worker safety, or the state's environment.

## **NO SIGNIFICANT EFFECT ON HOUSING COSTS**

The adoption of the proposed amendments to Regulation 1603 will not have a significant effect on housing costs.

## **DETERMINATION REGARDING ALTERNATIVES**

The Board must determine that no reasonable alternative considered by it or that has been otherwise identified and brought to its attention would be more effective in carrying out the purpose for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

## **CONTACT PERSONS**

Questions regarding the substance of the proposed amendments should be directed to Cary Huxsoll, Tax Counsel III, by telephone at (916) 323-3092, by e-mail at [Cary.Huxsoll@boe.ca.gov](mailto:Cary.Huxsoll@boe.ca.gov), or by mail at State Board of Equalization, Attn: Cary Huxsoll, MIC:82, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0082.

Written comments for the Board's consideration, notice of intent to present testimony or witnesses at the public hearing, and inquiries concerning the proposed administrative action should be directed to Mr. Rick Bennion, Regulations Coordinator, by telephone at (916) 445-2130, by fax at (916) 324-3984, by e-mail at [Richard.Bennion@boe.ca.gov](mailto:Richard.Bennion@boe.ca.gov), or by mail at State Board of Equalization, Attn: Rick Bennion, MIC:80, 450 N Street, P.O. Box 942879, Sacramento, CA 94279-0080.

## **WRITTEN COMMENT PERIOD**

The written comment period ends at 10:00 a.m. on March 25, 2014, or as soon thereafter as the Board begins the public hearing regarding the adoption of the proposed amendments to Regulation 1603 during the March 25-26, 2014, Board meeting. Written comments received by Mr. Rick Bennion at the postal address, email address, or fax number provided above, prior to the close of the written comment period, will be presented to the Board and the Board will consider the statements, arguments, and/or contentions contained in those written comments before the Board decides whether to adopt the proposed amendments to Regulation 1603. The Board will only consider written comments received by that time.

February 7, 2014

## **AVAILABILITY OF INITIAL STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATION**

The Board has prepared an underscored and strikeout version of the text of Regulation 1603 illustrating the express terms of the proposed amendments. The Board has also prepared an initial statement of reasons for the adoption of the proposed amendments to Regulation 1603, which includes the economic impact assessment required by Government Code section 11346.3, subdivision (b)(1). These documents and all the information on which the proposed amendments are based are available to the public upon request. The rulemaking file is available for public inspection at 450 N Street, Sacramento, California. The express terms of the proposed amendments and the initial statement of reasons are also available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov).

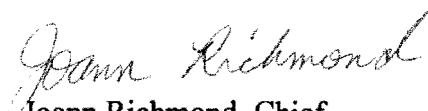
## **SUBSTANTIALLY RELATED CHANGES PURSUANT TO GOVERNMENT CODE SECTION 11346.8**

The Board may adopt the proposed amendments to Regulation 1603 with changes that are nonsubstantial or solely grammatical in nature, or sufficiently related to the original proposed text that the public was adequately placed on notice that the changes could result from the originally proposed regulatory action. If a sufficiently related change is made, the Board will make the full text of the proposed regulation, with the change clearly indicated, available to the public for at least 15 days before adoption. The text of the resulting regulation will be mailed to those interested parties who commented on the original proposed regulation orally or in writing or who asked to be informed of such changes. The text of the resulting regulation will also be available to the public from Mr. Bennion. The Board will consider written comments on the resulting regulation that are received prior to adoption.

## **AVAILABILITY OF FINAL STATEMENT OF REASONS**

If the Board adopts the proposed amendments to Regulation 1603, the Board will prepare a final statement of reasons, which will be made available for inspection at 450 N Street, Sacramento, California, and available on the Board's Website at [www.boe.ca.gov](http://www.boe.ca.gov)

Sincerely,

  
Joann Richmond, Chief  
Board Proceedings Division

JR:reb



**Initial Statement of Reasons for  
Proposed Amendments to California Code of Regulations,  
Title 18, Section 1603, *Taxable Sales of Food Products***

SPECIFIC PURPOSE, PROBLEM INTENDED TO BE ADDRESSED, NECESSITY, AND  
ANTICIPATED BENEFIT

Current Law

California imposes sales tax on retailers for the privilege of selling tangible personal property at retail. (Rev. & Tax. Code, § 6051.) Unless an exemption or exclusion applies, the tax is measured by a retailer's gross receipts from the retail sale of tangible personal property in California. (Rev. & Tax. Code, §§ 6012, 6051.) Although sales tax is imposed on retailers, retailers may collect sales tax reimbursement from their customers.

Civil Code section 1656.1 provides that whether a retailer may add sales tax reimbursement to the sales price of the tangible personal property sold at retail to a purchaser depends solely upon the terms of the agreement of sale. The sales tax reimbursement may be shown as a separately stated amount added to the separately stated sales price of the tangible personal property or the sales tax reimbursement may be included in the total lump-sum price charged for tangible personal property. Under Civil Code section 1656.1, it shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property if the retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable. California Code of Regulations, title 18, section (Regulation) 1700, generally provides that:

It shall be presumed that the property, the gross receipts from the sale of which is subject to the sales tax, is sold at a price which includes tax reimbursement if the retailer posts in his or her premises, or includes on a price tag or in an advertisement (whichever is applicable) one of the following notices:

1. "All prices of taxable items include sales tax reimbursement computed to the nearest mill."
2. "The price of this item includes sales tax reimbursement computed to the nearest mill."

Prior to 2001, Regulation 1574, *Vending Machine Operators*, also specifically provided that sales made through vending machines would be regarded as having been made on a tax-included basis if the vending machine operator posted a sign on or near the vending machine providing that "all prices of taxable items include sales tax reimbursement . . . ." As relevant here, in 2001, Regulation 1574 was amended to delete the requirement that vending machine operators post a

sign providing that their sales are made on a tax-included basis and to instead provide that “[s]ales of tangible personal property through vending machines are presumed to be made on a tax-included basis,” notwithstanding the fact that the signage discussed in Civil Code section 1656.1 is not present. The 2001 amendments were based on the nature of the vending machine industry and the expectation from customers purchasing items through vending machines that all taxable sales are made on a tax-included basis.

### Proposed Amendments

Mobile food vendors who sell food for immediate consumption from motorized vehicles, such as food trucks, or un-motorized carts, such as hot dog carts, do not generally have point of sale systems to calculate tax on individual transactions. Additionally, they often make sales in multiple tax districts in a given day and, as a result, their sales are often subject to varying tax rates. Therefore, similar to vending machine operators whose sales are discussed in Regulation 1574, it is common practice in the mobile food industry for mobile food vendors to make sales on a tax-included basis. It is common practice in the mobile food industry for mobile food vendors to round their tax-included prices to the nearest quarter or dollar. And, similar to the retailers and customers in the vending machine industry, mobile food vendors intend for the prices charged for the meals that they sell to include all applicable taxes, and their customers expect that amounts for sales tax reimbursement are included in the prices charged by the mobile food vendors.

In addition, while the mobile food industry practice is for mobile food vendors to include tax reimbursement in their menu prices, during recent audits, Board staff found that many mobile food vendors did not have a sign posted stating that tax reimbursement was included in their menu prices.

### *Interested Parties Process*

The Board’s Business Taxes Committee (BTC) staff prepared draft amendments adding a new subdivision (u) to Regulation 1603, *Taxable Sales of Food Products*, to address the mobile food vendors’ signage issue (or problem within the meaning of Gov. Code, § 11346.2, subdivision (b)). The draft amendments suggested adding provisions to the regulation generally describes “mobile food vendors” by providing that mobile food vendors include retailers who sell food and beverages for immediate consumption from motorized vehicles or un-motorized carts. The draft amendments provided that such vendors include vendors operating food trucks, coffee carts, and hot dog carts. The draft amendments also provided that effective July 1, 2014, sales by mobile food vendors are presumed to be made on a tax-included basis unless a separate amount for tax reimbursement is added to the price. And, the draft amendments provided that this presumption does not apply when a mobile food vendor is making sales as a “caterer” as defined in subdivision (h)(1) of Regulation 1603.

BTC staff subsequently provided its draft amendments to Regulation 1603 to the interested parties and conducted an interested parties meeting in August 2013 to discuss the draft amendments. During the August meeting, participants discussed the effect of the presumption and asked BTC staff whether the new presumption might have some unintended effects, such as:

- Making it more likely for a person to be held personally liable for sales tax liabilities owed by its mobile food vending business under RTC section 6829;
- Making it more likely for a mobile food vendor to receive the 40 percent penalty imposed under RTC section 6597; and
- Potentially restricting mobile food vendors' participation in the Board's Offers in Compromise Program under RTC section 7093.6.

BTC staff determined that the potential effect of the new presumption was limited, particularly because the presumption may be overcome. BTC staff also determined that the instances in which a retailer would need to overcome the presumption were uncommon.

With respect to personal liability imposed under RTC section 6829, as stated above, the presumption can be overcome. Further, collection of tax reimbursement is only one of the four required elements. The Board cannot hold a responsible person liable for sales tax reimbursement the business collected, unless the Board can also demonstrate that the person willfully failed to pay the tax or cause it to be paid to the Board. Consequently, the presumption alone is unlikely to have a significant impact on responsible person liability. Similarly, the presumption does not increase the likelihood that the 40 percent penalty imposed under RTC section 6597 will apply. For the penalty to apply, in addition to evidence that taxpayer charged or collected tax reimbursement, it must also be shown by "clear and convincing" evidence that the deficiency was the result of an intent to evade the tax. With respect to the Offers in Compromise program, the operation of the presumption would not preclude a taxpayer from participating in the program. For an ongoing business to participate in the program, it need only provide evidence to rebut the presumption that tax reimbursement was collected. Therefore, BTC staff determined that it was not necessary to draft and suggest further amendments to Regulation 1603 to address the application of RTC sections 6597, 6829, and 7093.6, at this time.

Following the interested parties meeting, other Board staff recommended that new subdivision (u) be revised to remove the language indicating that the new presumption will be "[e]ffective July 1, 2014" and instead include new language stating that it will apply to mobile food vendors' "[s]ales made on or after July 1, 2014." BTC staff agreed that the changes would make the application of the new presumption more clear and revised the draft amendments to the regulation, accordingly.

#### *November 19, 2013, BTC Meeting*

Subsequently, BTC staff prepared Formal Issue Paper 13-009 and distributed it to the Board Members for consideration at the Board's November 19, 2013, BTC meeting. Formal Issue Paper 13-009 recommended that the Board propose to add subdivision (u) to Regulation 1603 to define the term "mobile food vendors," and provide that, for sales made on and after July 1, 2014, unless a separate amount for tax reimbursement is added to the price of meals, a mobile food vendors' sales of taxable items are presumed to be made on a tax included basis. The formal issue paper also recommended that new subdivision (u) provide that this presumption does not apply when a mobile food vendor is making sales as a "caterer" as defined in subdivision (h)(1) of Regulation 1603.

At the conclusion of the Board's discussion of Formal Issue Paper 13-009 during the November 19, 2013, Business Taxes Committee meeting, the Board Members unanimously voted to propose the amendments to Regulation 1603 recommended in the formal issue paper. The Board determined that the proposed amendments to Regulation 1603 are reasonably necessary to have the effect and accomplish the specific purpose of addressing the mobile food vendors' signage issue by permitting mobile food vendors to make sales on a tax included basis even in the absence of signage expressly providing that their sales are made on a tax-included basis.

The Board anticipates that the proposed amendments to Regulation 1603 will promote fairness and benefit taxpayers, Board staff, and the Board by providing regulatory provisions consistent with industry practice and the understanding of mobile food vendors and their customers that mobile food vendors' sales are made on a tax-included basis.

In addition, the Board has determined that the proposed amendments are not mandated by federal law or regulations, and there are no federal regulations or statutes that are identical to Regulation 1603 or the proposed amendments to Regulation 1603.

#### DOCUMENTS RELIED UPON

The Board relied upon Formal Issue Paper 13-009, the exhibits to the issue paper, and the comments made during the Board's discussion of the issue paper during its November 19, 2013, BTC meeting in deciding to propose the amendments to Regulation 1603 described above.

#### ALTERNATIVES CONSIDERED

The Board considered whether to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1603 at this time or, alternatively, whether to take no action at this time. The Board decided to begin the formal rulemaking process to adopt the proposed amendments to Regulation 1603 at this time because the Board determined that the proposed amendments are reasonably necessary for the reasons set forth above.

The Board did not reject any reasonable alternative to the proposed amendments to Regulation 1603 that would lessen any adverse impact the proposed action may have on small business or that would be less burdensome and equally effective in achieving the purposes of the proposed action. No reasonable alternative has been identified and brought to the Board's attention that would lessen any adverse impact the proposed action may have on small business, be more effective in carrying out the purposes for which the action is proposed, would be as effective and less burdensome to affected private persons than the proposed action, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of law than the proposed action.

INFORMATION REQUIRED BY GOVERNMENT CODE SECTION 11346.2,  
SUBDIVISION (b)(5) AND ECONOMIC IMPACT ASSESSMENT REQUIRED BY  
GOVERNMENT CODE SECTION 11346.3, SUBDIVISION (b)

The sales tax reimbursement may be shown as a separately stated amount added to the stated sales price of the tangible personal property or the sales tax reimbursement may be included in the total lump-sum price charged for tangible personal property. As previously explained, under Civil Code section 1656.1, it shall be presumed that the parties agreed to the addition of sales tax reimbursement to the sales price of tangible personal property if the retailer posts in his or her premises in a location visible to purchasers, or includes on a price tag or in an advertisement or other printed material directed to purchasers, a notice to the effect that reimbursement for sales tax will be added to the sales price of all items or certain items, whichever is applicable. Regulation 1700 contains a general presumption that taxable tangible personal property is sold at a price which includes tax reimbursement if the retailer posts a specified sign to that effect.

As previously explained, mobile food vendors do not generally have point of sale systems to calculate tax on individual transactions. Additionally, they often make sales in multiple tax districts in a given day and, as a result, their sales are often subject to varying tax rates. Therefore, it is common practice in the mobile food industry for mobile food vendors to make sales on a tax-included basis. It is common practice in the mobile food industry for mobile food vendors to round their tax-included prices to the nearest quarter or dollar. And, mobile food vendors generally intend for the prices charged for the meals that they sell to include all applicable taxes, and their customers expect that amounts for sales tax reimbursement are included in prices charged by the mobile food vendors.

Also, as previously explained, while the mobile food industry practice is for mobile food vendors to include tax reimbursement in their menu prices, during recent audits, Board staff found that many mobile food vendors did not have a sign posted stating that tax was included in their menu prices.

The amendments to Regulation 1603 generally describe “mobile food vendors” and provide that for sales made by mobile food vendors on or after July 1, 2014, it is presumed that the sales are made on a tax-included basis, unless the vendor adds a separate amount for tax reimbursement to the price charged to its customer. The proposed amendments are intended to make Regulation 1603 consistent with the mobile food industry’s practice, which is to include tax reimbursement in menu prices, and there is nothing in the proposed amendments to Regulation 1603 that would significantly change how mobile food vendors and their customers would generally behave in the absence of the proposed amendments.

In addition, the amendments to Regulation 1603 do not require any further action by mobile food vendors or their customers in order for the presumption to apply, and the proposed amendments permit, but do not require mobile food vendors to rebut the presumption by adding a separate amount for sales tax reimbursement to the sale price of the items they sale. Therefore, the proposed amendments do not impose any costs on any persons, including mobile food vending businesses. The Board estimates that the proposed amendments will not have a measurable economic impact on individuals and business. And, the Board has determined that the proposed amendments to Regulation 1603 are not a major regulation, as defined in Government Code section 11342.548 and California Code of Regulations, title 1, section 2000, because the Board has estimated that the proposed amendments will not have an economic impact on California

business enterprises and individuals in an amount exceeding fifty million dollars (\$50,000,000) during any 12-month period.

Further, based on these facts and all of the information in the rulemaking file, the Board has also determined that the adoption of the proposed amendments to Regulation 1603 will neither create nor eliminate jobs in the State of California nor result in the elimination of existing businesses nor create or expand business in the State of California.

Furthermore, Regulation 1603 does not regulate the health and welfare of California residents, worker safety, or the state's environment. Therefore, the Board has also determined that the adoption of the proposed amendments to Regulation 1603 will not affect the benefits of Regulation 1603 to the health and welfare of California residents, worker safety, or the state's environment.

The forgoing information also provides the factual basis for the Board's initial determination that the adoption of the proposed amendments to Regulation 1603 will not have a significant adverse economic impact on business.

The proposed amendments to Regulation 1603 may affect small businesses.

**Text of Proposed Amendments to  
California Code of Regulations, Title 18, Section 1603**

**1603. Taxable Sales of Food Products.**

**(a) Restaurants, Hotels, Boarding Houses, Soda Fountains, and Similar Establishments.**

**(1) Definitions.**

(A) Boarding House. The term “boarding house” as used in this regulation means any establishment regularly serving meals, on the average to five or more paying guests. The term includes a “guest home,” “residential care home,” “halfway house,” and any other establishment providing room and board or board only, which is not an institution as defined in Regulation 1503 and section 6363.6 of the Revenue and Taxation Code. The fact that guests may be recipients of welfare funds does not affect the application of tax. A person or establishment furnishing meals on the average to fewer than five paying guests during the calendar quarter is not considered to be engaged in the business of selling meals at retail.

(B) American Plan Hotel. The term “American Plan Hotel” as used in this regulation means a hotel which charges guests a fixed sum by the day, week, or other period for room and meals combined.

(C) Complimentary Food and Beverages. As used in this subdivision (a), the term “complimentary food and beverages” means food and beverages (including alcoholic and non-alcoholic beverages) which are provided to transient guests on a complimentary basis and:

1. There is no segregation between the charges for rooms and the charges for the food and beverages on the guests’ bills, and
2. The guests are not given an option to refuse the food and beverages in return for a discounted room rental.

(D) Average Retail Value of Complimentary Food and Beverages. The term “average retail value of complimentary food and beverages” (ARV) as used in this regulation means the total amount of the costs of the complimentary food and beverages for the preceding calendar year marked-up one hundred percent (100%) and divided by the number of rooms rented for that year. Costs of complimentary food and beverages include charges for delivery to the lodging establishment but exclude discounts taken and sales tax reimbursement paid to vendors. The 100% markup factor includes the cost of food preparation labor by hotel employees, the fair rental value of hotel facilities used to prepare or serve the food and beverages, and profit.

(E) Average Daily Rate. The term “average daily rate” (ADR) as used in this regulation means the gross room revenue for the preceding calendar year divided by the number of rooms rented for that year. “Gross room revenue” means and includes the full charge to the hotel customers but excludes separately stated occupancy taxes, revenue from

contract and group rentals which do not qualify for complimentary food and beverages, and revenue from special packages (e.g., New Year's Eve packages which include food and beverages as well as guest room accommodations), unless it can be documented that the retail value of the food and beverages provided as a part of the special package is 10% or less of the total package charge as provided in subdivision (a)(2)(B). "Number of rooms rented for that year" means the total number of times all rooms have been rented on a nightly basis provided the revenue for those rooms is included in the "gross room revenue". For example, if a room is rented out for three consecutive nights by one guest, that room will be counted as rented three times when computing the ADR.

## (2) Application Of Tax.

(A) In General. Tax applies to sales of meals or hot prepared food products (see (e) below) furnished by restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments whether served on or off the premises. In the case of American Plan hotels, special packages offered by hotels, e.g., a New Year's Eve package as described in subdivision (a)(1)(E), and boarding houses, a reasonable segregation must be made between the charges for rooms and the charges for the meals, hot prepared food products, and beverages. Charges by hotels or boarding houses for delivering meals or hot prepared food products to, or serving them in, the rooms of guests are includable in the measure of tax on the sales of the meals or hot prepared food products whether or not the charges are separately stated. (Caterers, see (h) below.) Sales of meals or hot prepared food products by restaurants, concessionaires, hotels, boarding houses, soda fountains, and similar establishments to persons such as event planners, party coordinators, or fundraisers, which buy and sell on their own account, are sales for resale for which a resale certificate may be accepted (see subdivision (h)(3)(C)2.)

Souffle cups, straws, paper napkins, toothpicks and like items that are not of a reusable character which are furnished with meals or hot prepared food products are sold with the meals or hot prepared food products. Sales of such items for such purpose to persons engaged in the business of selling meals or hot prepared food products are, accordingly, sales for resale.

(B) Complimentary Food and Beverages. Lodging establishments which furnish, prepare, or serve complimentary food and beverages to guests in connection with the rental of rooms are consumers and not retailers of such food and beverages when the retail value of the complimentary food and beverages is "incidental" to the room rental service regardless of where within the hotel premises the complimentary food and beverages are served. For complimentary food and beverages to qualify as "incidental" for the current calendar year, the average retail value of the complimentary food and beverages (ARV) furnished for the preceding calendar year must be equal to or less than 10% of the average daily rate (ADR) for that year.

If a hotel provides guests with coupons or similar documents which may be exchanged for complimentary food and beverages in an area of the hotel where food and beverages are sold on a regular basis to the general public (e.g., a restaurant), the hotel will be



considered the consumer and not the retailer of such food and beverages if the coupons or similar documents are non-transferable and the guest is specifically identified by name. If the coupons or similar documents are transferable or the guest is not specifically identified, food and beverages provided will be considered sold to the guest at the fair retail value of similar food and beverages sold to the general public. In the case of coupons redeemed by guests at restaurants not operated by the lodging establishment, the hotel will be considered the consumer of food and beverages provided to the hotel's guests and tax will apply to the charge by the restaurant to the hotel.

Lodging establishments are retailers of food and beverages which do not qualify as "incidental" and tax applies as provided in subdivision (a)(2)(A) above. Amounts paid by guests for food and beverages in excess of a complimentary allowance are gross receipts subject to the tax. Lodging establishments are retailers of otherwise complimentary food and beverages sold to non-guests.

In the case of hotels with concierge floor, club level or similar programs, the formula set forth above shall be applied separately with respect to the complimentary food and beverages furnished to guests who participate in the concierge, club or similar program. That is, the concierge, club or similar program will be deemed to be an independent hotel separate and apart from the hotel in which it is operated. The ADR and the retail value of complimentary food and beverages per occupied room will be computed separately with respect to the guest room accommodations entitled to the privileges and amenities involved in the concierge, club or similar program.

The following example illustrates the steps in determining whether the food and beverages are complimentary:

FORMULA:	$ARV/ADR3 < \text{or} = 10\%$
Average Daily Rate (ADR):	
Room Revenue	\$9,108,000
Rooms Rented	74,607
ADR (\$9,108,000/74,607)	\$122.08
Average Retail Value of Complimentary Food and Beverages (ARV):	
Complimentary Food Cost	\$169,057
Complimentary Beverage Cost	52,513
Total	\$221,570
Add 100% Markup	221,570
Average Retail Value	\$443,140
ARV per occupied room (\$443,140/74,607)	\$5.94
Application of Formula:	$\$5.94/\$122.08 = 4.87\%$

In the above example, the average retail value of the complimentary food and beverages per occupied room for the preceding calendar year is equal to or less than 10% of the average daily rate. Therefore, under the provisions of this subdivision (a)(2)(B), the complimentary food and beverages provided to guests for the current calendar year

qualify as “incidental”. The lodging establishment is the consumer and not the retailer of such food and beverages. This computation must be made annually.

When a lodging establishment consists of more than one location, the operations of each location will be considered separately in determining if that location’s complimentary food and beverages qualify as incidental.

(C) “Free” Meals. When a restaurant agrees to furnish a “free” meal to a customer who purchases another meal and presents a coupon or card, which the customer previously had purchased directly from the restaurant or through a sales promotional agency having a contract with the restaurant to redeem the coupons or cards, the restaurant is regarded as selling two meals for the price of one, plus any additional compensation from the agency or from its own sales of coupons. Any such additional compensation is a part of its taxable gross receipts for the period in which the meals are served.

Tax applies only to the price of the paid meal plus any such additional compensation.

(b) “Drive-Ins.” Tax applies to sales of food products ordinarily sold for immediate consumption on or near a location at which parking facilities are provided primarily for the use of patrons in consuming the products purchased at the “drive-in” establishment, even though such products are sold on a “take out” or “to go” order and are actually packaged or wrapped and taken from the premises of the retailer. Food products when sold in bulk, i.e., in quantities or in a form not suitable for consumption on the retailer’s premises, are not regarded as ordinarily sold for immediate consumption on or near the location at which parking facilities are provided by the retailer. Accordingly, with the exception of sales of hot prepared food products (see (e) below) and sales of cold food under the 80-80 rule (see (c) below), sales of ice cream, doughnuts, and other individual food items in quantities obviously not intended for consumption on the retailer’s premises, without eating utensils, trays, or dishes and not consumed on the retailer’s premises, are exempt from tax. Any retailer claiming a deduction on account of food sales of this type must support the deduction by complete and detailed records.<sup>1</sup>

(c) Cold Food Sold on a “Take-Out” Order.

(1) General.

(A) Seller Meeting Criteria of 80-80 Rule. When a seller meets both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax applies to sales of cold food products (including sales for a separate price of hot bakery goods and hot beverages such as coffee) in a form suitable for consumption on the seller’s premises even though such food products are sold on a “take-out” or “to go” order. Sales of cold food products which are suitable for consumption on the seller’s premises are subject to the tax no matter how great the quantity purchased, e.g., 40 one-half pint containers of milk. Except as provided elsewhere in this regulation, tax does not apply to sales of food products which are furnished in a form not suitable for consumption on the seller’s premises.

Operative April 1, 1996, although a seller may meet both criteria of the 80-80 rule, he or she may elect to separately account for the sale of “take-out” or “to go” orders of cold food products which are in a form suitable for consumption on the seller’s premises. The gross receipts from the sale of those food products shall be exempt from the tax provided the seller keeps a separate accounting of these transactions in his or her records. Tax will remain applicable to the sale of food products as provided in subdivisions (a), (b), (e), or (f) of this regulation. Failure to maintain the required separate accounting and documentation claimed as exempt under this subdivision will revoke the seller’s election under this subdivision.

(B) Seller Not Meeting Criteria of 80-80 Rule. When a seller does not meet both criteria of the 80-80 rule as explained in subdivision (c)(3) below, tax does not apply to sales of cold food products (including sales for a separate price of hot bakery goods and hot beverages such as coffee) when sold on a “take-out” or “to go” order.

## (2) Definitions.

(A) For purposes of this subdivision (c), the term “suitable for consumption on the seller’s premises” means food products furnished:

1. In a form which requires no further processing by the purchaser, including but not limited to cooking, heating, thawing, or slicing, and
2. In a size which ordinarily may be immediately consumed by one person such as a large milk shake, a pint of ice cream, a pint of milk, or a slice of pie. Cold food products (excluding milk shakes and similar milk products) furnished in containers larger in size than a pint are considered to be in a form not suitable for immediate consumption.

Pieces of candy sold in bulk quantities of one pound or greater are deemed to be sold in a form not suitable for consumption on the seller’s premises.

The term does not include cold food products which obviously would not be consumed on the premises of the seller, e.g., a cold party tray or a whole cold chicken.

(B) For purposes of this subdivision (c), the term “seller’s premises” means the individual location at which a sale takes place rather than the aggregate of all locations of the seller. For example, if a seller operates several drive-in and fast food restaurants, the operations of each location stand alone and are considered separately in determining if the sales of food products at each location meet the criteria of the 80-80 rule.

When two or more food-selling activities are conducted by the same person at the same location, the operations of all food related activities will be considered in determining if the sales of food products meet the criteria of the 80-80 rule. For example, if a seller operates a grocery store and a restaurant with no physical separation other than separate cash registers, the grocery store operations will be included in determining if the sales of

food products meet the criteria of the 80-80 rule. When there is a physical separation where customers of one operation may not pass freely into the other operation, e.g., separate rooms with separate entrances but a common kitchen, each operation will be considered separately for purposes of this subdivision (c).

(3) 80-80 Rule. Tax applies under this subdivision (c) only if the seller meets both of the following criteria:

(A) More than 80 percent of the seller's gross receipts are from the sale of food products, and

(B) More than 80 percent of the seller's retail sales of food products are taxable as provided in subdivisions (a), (b), (e), and (f) of this regulation.

Sales of alcoholic beverages, carbonated beverages, or cold food to go not suitable for immediate consumption should not be included in this computation. Any seller meeting both of these criteria and claiming a deduction for the sale of cold food products in a form not suitable for consumption on the seller's premises must support the deduction by complete and detailed records of such sales made.

(d) Places Where Admission Is Charged.

(1) General. Tax applies to sales of food products when sold within, and for consumption within, a place the entrance to which is subject to an admission charge, during the period when the sales are made, except for national and state parks and monuments, and marinas, campgrounds, and recreational vehicle parks.

(2) Definitions.

(A) "Place" means an area the exterior boundaries of which are defined by walls, fences or otherwise in such a manner that the area readily can be recognized and distinguished from adjoining or surrounding property. Examples include buildings, fenced enclosures and areas delimited by posted signs.

(B) "Within a place" means inside the door, gate, turnstile, or other point at which the customer must pay an admission charge or present evidence, such as a ticket, that an admission charge has been paid. Adjacent to, or in close proximity to, a place is not within a place.

(C) "Admission charge" means any consideration required to be paid in money or otherwise, for admittance to a place.

"Admission charge" does not include:

1. Membership dues in a club or other organization entitling the member to, among other things, entrance to a place maintained by the club or organization, such as a

fenced area containing a club house, tennis courts, and a swimming pool. Where a guest is admitted to such a place only when accompanied by or vouched for by a member of the club or organization, any charge made to the guest for use of facilities in the place is not an admission charge.

2. A charge for a student body card entitling the student to, among other things, entrance to a place, such as entrance to a school auditorium at which a dance is held.

3. A charge for the use of facilities within a place to which no entrance charge is made to spectators. For example, green fees paid for the privilege of playing a golf course, a charge made to swimmers for the use of a pool within a place, or a charge made for the use of lanes in a public bowling place.

(D) "National and state parks and monuments" means those which are part of the National Park System or the State Park System. The phrase does not include parks and monuments not within either of those systems, such as city, county, regional, district or private parks.

### (3) Presumption That Food Is Sold for Consumption Within a Place.

When food products are sold within a place the entrance to which is subject to an admission charge, it will be presumed, in the absence of evidence to the contrary, that the food products are sold for consumption within the place. Obtaining and retaining evidence in support of the claimed tax exemption is the responsibility of the retailer. Such evidence may consist, for example, of proof that the sales were of canned jams, cake mixes, spices, cooking chocolate, or other items in a form in which it is unlikely that such items would be consumed within the place where sold.

(4) Food Sold to Students. The exemption otherwise granted by Section 6363 does not apply to sales of food products to students when sold within, and for consumption within, a place the entrance to which is subject to an admission charge, and such sales are subject to tax except as provided in (p) of this regulation. For example, when food products are sold by a student organization to students or to both students and nonstudents within a place the entrance to which is subject to an admission charge, such as a place where school athletic events are held, the sales to both students and nonstudents are taxable.

### (e) Hot Prepared Food Products.

(1) General. Tax applies to all sales of hot prepared food products unless otherwise exempt. "Hot prepared food products" means those products, items, or components which have been prepared for sale in a heated condition and which are sold at any temperature which is higher than the air temperature of the room or place where they are sold. The mere heating of a food product constitutes preparation of a hot prepared food product, e.g., grilling a sandwich, dipping a sandwich bun in hot gravy, using infra-red lights, steam tables, etc.. If the sale is intended to be of a hot food product, such sale is of a hot food product regardless of cooling which incidentally occurs. For example, the sale of a toasted sandwich intended to be in a

heated condition when sold, such as a fried ham sandwich on toast, is a sale of a hot prepared food product even though it may have cooled due to delay. On the other hand, the sale of a toasted sandwich which is not intended to be in a heated condition when sold, such as a cold tuna sandwich on toast, is not a sale of a hot prepared food product.

When a single price has been established for a combination of hot and cold food items, such as a meal or dinner which includes cold components or side items, tax applies to the entire established price regardless of itemization on the sales check. The inclusion of any hot food product in an otherwise cold combination of food products sold for a single established price, results in the tax applying to the entire established price, e.g., hot coffee served with a meal consisting of cold food products, when the coffee is included in the established price of the meal. If a single price for the combination of hot and cold food items is listed on a menu, wall sign or is otherwise advertised, a single price has been established. Except as otherwise provided in (b), (c), (d) or (f) of this regulation, or in Regulation 1574, tax does not apply to the sale for a separate price of bakery goods, beverages classed as food products, or cold or frozen food products. Hot bakery goods and hot beverages such as coffee are hot prepared food products but their sale for a separate price is exempt unless taxable as provided in (b), (c), (d) or (f) of this regulation, or in Regulation 1574. Tax does apply if a hot beverage and a bakery product or cold food product are sold as a combination for a single price. Hot soup, bouillon, or consomme is a hot prepared food product, which is not a beverage.

(2) Air Carriers Engaged in Interstate or Foreign Commerce. Tax does not apply to the sale, storage, use, or other consumption of hot prepared food products sold by caterers or other vendors to air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers, nor to the sale, storage, use, or other consumption of hot prepared food products sold or served to passengers by air carriers engaged in interstate or foreign commerce for consumption by passengers on such air carriers. "Air carriers" are persons or firms in the business of transporting persons or property for hire or compensation, and include both common and contract carriers. "Passengers" do not include crew members. Any caterer or other vendor claiming the exemption must support it with an exemption certificate from the air carrier substantially in the form prescribed in Appendix A of this regulation.

(f) Food for Consumption at Facilities Provided by the Retailer. Tax applies to sales of sandwiches, ice cream, and other foods sold in a form for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare, or serve food products to others.

A passenger's seat aboard a train, or a spectator's seat at a game, show, or similar event is not a "chair" within the meaning of this regulation. Accordingly, except as otherwise provided in (c), (d), and (e) above, tax does not apply to the sale of cold sandwiches, ice cream, or other food products sold by vendors passing among the passengers or spectators where the food products are not "for consumption at tables, chairs, or counters or from trays, glasses, dishes, or other tableware provided by the retailer."

(g) Tips, Gratuities, and Service Charges.

This subdivision applies to restaurants, hotels, caterers, boarding houses, soda fountains, drive-ins and similar establishments.

An optional payment designated as a tip, gratuity, or service charge is not subject to tax. A mandatory payment designated as a tip, gratuity, or service charge is included in taxable gross receipts, even if the amount is subsequently paid by the retailer to employees.

(1) Optional Payment.

(A) A payment of a tip, gratuity, or service charge is optional if the customer adds the amount to the bill presented by the retailer, or otherwise leaves a separate amount in payment over and above the actual amount due the retailer for the sale of meals, food, and drinks that include services. The following examples illustrate transactions where a payment of a tip, gratuity or service charge is optional and not included in taxable gross receipts. This is true regardless of printed statements on menus, brochures, advertisements or other materials notifying customers that tips, gratuities, or service charges will or may be added by the retailer to the prices of meals, food, or drinks:

Example 1. The restaurant check is presented to the customer with the "tip" area blank so the customer may voluntarily write in an amount, or

Example 2. The restaurant check is presented to the customer with options computed by the retailer and presented to the customer as tip suggestions. The "tip" area is blank so the customer may voluntarily write in an amount:

Guest Check	
Food Item A	\$9.95
Beverage Item B	3.75
Subtotal	\$13.70
8% sales tax	1.10
Subtotal	\$14.80

Tip\*

Total

\*Suggested tips:

15%=\$2.06; 18%=\$2.47; 20%=\$2.74; other.

If an employer misappropriates these payments for these charges, as discussed in subdivision (g)(1)(B) below, such payments are included in the retailer's taxable gross receipts.

(B) No employer shall collect, take, or receive any gratuity or a part thereof, paid, given to, or left for an employee by a patron, or deduct any amount from wages due an employee on account of such gratuity, or require an employee to credit the amount, or any part thereof, of such gratuity against and as a part of the wages due the employee from the employer. (Labor Code section 351.) If this prohibition is violated, any amount

of such gratuities received by the employer will be considered a part of the gross receipts of the employer and subject to the tax.

**(2) Mandatory Payment.**

(A) An amount negotiated between the retailer and the customer in advance of a meal, food, or drinks, or an event that includes a meal, food, or drinks is mandatory.

(B) When the menu, brochures, advertisements or other printed materials contain statements that notify customers that tips, gratuities, or service charges will or may be added, an amount automatically added by the retailer to the bill or invoice presented to and paid by the customer is a mandatory charge and subject to tax. These amounts are considered negotiated in advance as specified in subdivision (g)(2)(A). Examples of printed statements include:

“An 18% gratuity [or service charge] will be added to parties of 8 or more.”

“Suggested gratuity 15%,” itemized on the invoice or bill by the restaurant, hotel, caterer, boarding house, soda fountain, drive-in or similar establishment.

“A 15% voluntary gratuity will be added for parties of 8 or more.”

An amount will be considered “automatically added” when the retailer adds the tip to the bill without first conferring with the customer after service of the meal and receiving approval to add the tip or without providing the customer with the option to write in the tip. Nonetheless, any amount added by the retailer is presumed to be mandatory. This presumption may be overcome as discussed in subdivision (g)(2)(C) below.

(C) It is presumed that an amount added as a tip by the retailer to the bill or invoice presented to the customer is mandatory. A statement on the bill or invoice that the amount added by the retailer is a “suggested tip,” “optional gratuity,” or that “the amount may be increased, decreased, or removed” by the customer does not change the mandatory nature of the charge.

This presumption may be controverted by documentary evidence showing that the customer specifically requested and authorized the gratuity be added to the amount billed.

Examples of documentary evidence that may be used to overcome the presumption include:

1. A guest check that is presented to the customer showing sales tax reimbursement and the amount upon which it was computed, without tip or with the “tip” area blank and a separate document, such as a credit card receipt, to which the retailer adds or prints the requested tip.



2. Guests receipts and payments showing that the percentage of tips paid by large groups varies from the percentage stated on the menu, brochure, advertisement or other printed materials.

3. A retailer's written policy stating that its employees shall receive confirmation from a customer before adding a tip together with additional verifiable evidence that the policy has been enforced. The policy is not in itself sufficient documentation to establish that the customer requested and authorized that a gratuity be added to the amount billed without such additional verifiable evidence.

The retailer must retain the guest checks and any additional separate documents to show that the payment is optional. The retailer is also required to maintain other records in accordance with the requirements of Regulation 1698, Records.

(h) Caterers.

(1) Definition. The term "caterer" as used in this regulation means a person engaged in the business of serving meals, food, or drinks on the premises of the customer, or on premises supplied by the customer, including premises leased by the customer from a person other than the caterer, but does not include employees hired by the customer by the hour or day.

(2) Sales to Caterers. A caterer generally is considered to be the consumer of tangible personal property normally used in the furnishing and serving of meals, food or drinks, except for separately stated charges by the caterer for the lease of tangible personal property or tangible personal property regarded as being sold with meals, food or drinks such as disposable plates, napkins, utensils, glasses, cups, stemware, place mats, trays, covers and toothpicks.

(3) Sales by Caterers.

(A) Caterer as Retailer. Tax applies to the entire charge made by caterers for serving meals, food, and drinks, inclusive of charges for food, the use of dishes, silverware, glasses, chairs, tables, etc., used in connection with serving meals, and for the labor of serving the meals, whether performed by the caterer, the caterer's employees or subcontractors. Tax applies to charges made by caterers for preparing and serving meals and drinks even though the food is not provided by the caterers. Tax applies to charges made by caterers for hot prepared food products as in (e) above whether or not served by the caterers. A caterer who separately states or itemizes charges for the lease of tangible personal property regardless of the use of the property will be deemed to be the lessor of such property. Tax applies in accordance with Regulation 1660 Leases of Tangible Personal Property - In General. Tax does not apply to charges made by caterers for the rental of dishes, silverware, glasses, etc., purchased by the caterer with tax paid on the purchase price if no food is provided or served by the caterers in connection with such rental.

**(B) Caterers as Lessors of Property Unrelated to the Serving or Furnishing of Meals, Food, or Drinks by a Caterer.**

1. When a caterer who is furnishing or serving meals, food, or drinks also rents or leases from a third party tangible personal property which the caterer does not use himself or herself and the property is not customarily provided or used within the catering industry in connection with the furnishing and serving of food or drinks, such as decorative props related solely to optional entertainment, special lighting for guest speakers, sound or video systems, dance floors, stages, etc., he or she is a lessor of such property. In such instance, tax applies to the lease in accordance with Regulation 1660.
2. When a person who in other instances is a caterer does not furnish or serve any meals, food, or drinks to a customer, but rents or leases from a third party tangible personal property such as dishes, linen, silverware and glasses, etc., for purposes of providing it to his or her customer, he or she is not acting as a caterer within the meaning of this regulation, but solely as a lessor of tangible personal property. In such instances tax applies to the lease in accordance with Regulation 1660.

**(C) Caterers Planning, Designing and Coordinating Events.**

1. Tax applies to charges by a caterer for event planning, design, coordination, and/or supervision if they are made in connection with the furnishing of meals, food, or drinks for the event. Tax does not apply to separately stated charges for services unrelated to the furnishing and serving of meals, food, or drinks, such as optional entertainment or any staff who do not directly participate in the preparation, furnishing, or serving of meals, food, or drinks, e.g., coat-check clerks, parking attendants, security guards, etc.
2. When a caterer sells meals, food, or drinks, and the serving of them, to other persons such as event planners, party coordinators, or fundraisers, who buy and sell the same on their own account or for their own sake, it is a sale for resale for which the caterer may accept a resale certificate. However, a caterer may only claim the sale as a resale if the caterer obtains a resale certificate in compliance with Regulation 1668. A person is buying or selling for his or her own account, or own sake, when such person has his or her own contract with a customer to sell the meals, food, or drinks to the customer, and is not merely acting on behalf of the caterer.
3. When a caterer sells meals, food or drinks and the serving of them to other persons who charge a fee for their service unrelated to the taxable sale, the separately stated fee is not subject to tax.

**(D) Sales of Meals by Caterers to Social Clubs, Fraternal Organizations. Sales of meals to social clubs and fraternal organizations, as those terms are defined in subdivision (i) below, by caterers are sales for resale if such social clubs and fraternal organizations are**

the retailers of the meals subject to tax under subdivision (i) and give valid resale certificates therefor.

(E) Tips, Gratuities, or Service Charges. Tips, gratuities, and service charges are discussed in subdivision (g).

(4) Premises. General. Separately stated charges for the lease of premises on which meals, food, or drinks are served, are nontaxable leases of real property. Where a charge for leased premises is a guarantee against a minimum purchase of meals, food or drinks, the charge for the guarantee is gross receipts subject to tax. Where a person contracts to provide both premises and meals, food or drinks, the charge for the meals, food or drinks must be reasonable in order for the charge for the premises to be non taxable.

(5) Private Chefs. A private chef is generally not an employee of the customer, but an independent contractor who pays his or her own social security, and federal and state income taxes. Such a private chef, who prepares and serves meals, food and drinks in the home of his or her customer is a caterer under this regulation.

(i) Social Clubs and Fraternal Organizations. "Social Clubs and Fraternal Organizations" as used herein include any corporation, partnership, association or group or combination acting as a unit, such as service clubs, lodges, and community, country, and athletic clubs.

The tax applies to receipts from the furnishing of meals, food, and drink by social clubs and fraternal organizations unless furnished: (1) exclusively to members; and also, (2) less frequently than once a week. Both these requirements must be met. If the club or organization furnishes meals, food or drink to nonmembers, all receipts from the furnishing of meals, food or drink are subject to tax whether furnished to members or nonmembers, including receipts on occasions when furnished exclusively to members. Meals, food or drink paid for by members are considered furnished to them even though consumed by guests who are not members.

(j) Student Meals.

(1) Definitions.

(A) "Food Products". As used herein, the term "food products" as defined in Regulation 1602 (18 CCR 1602) includes food furnished, prepared, or served for consumption at tables, chairs, or counters, or from trays, glasses, dishes, or other tableware provided by the retailer or by a person with whom the retailer contracts to furnish, prepare or serve food to others.

(B) "Meals". As used herein, the term "meals" includes both food and nonfood products which are sold to students for an established single price at a time set aside for meals. If a single price for the combination of a nonfood product and a food product is listed on a menu or on a sign, a single price has been established. The term "meals" does not include nonfood products which are sold to students for a separate price and tax applies to the sales of such products. Examples of nonfood products are: carbonated beverages and

beer. For the purpose of this regulation, products sold at a time designated as a “nutrition break”, “recess”, or similar break, will not be considered “meals”.

**(2) Application of Tax.**

(A) Sales by Schools, School Districts and Student Organizations. Sales of meals or food products for human consumption to students of a school by public or private schools, school districts, and student organizations are exempt from tax, except as otherwise provided in (d)(4) above.

(B) Sales by Parent-Teacher Associations. Tax does not apply to the sale of, nor the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served to the students of a school by parent-teacher associations. Parent-teacher associations qualifying under Regulation 1597 as consumers are not retailers of tangible personal property, which they sell. Accordingly, tax does apply to the sale to such associations of nonfood items such as carbonated beverages, containers, straws and napkins.

(C) Sales by Blind Vendors. Tax does not apply to the sale of meals or food products for human consumption to students of a school by any blind person (as defined in section 19153 of the Welfare and Institutions Code) operating a restaurant or vending stand in an educational institution under article 5 of chapter 6 of part 2 of division 10 of the Welfare and Institutions Code, except as otherwise provided in (d)(4) above.

(D) Sales by Caterers. The application of tax to sales by caterers in general is explained in subdivision (h) above. However, tax does not apply to the sale by caterers of meals or food products for human consumption to students of a school, if all the following criteria are met:

1. The premises used by the caterer to serve the lunches to the students are used by the school for other purposes, such as sporting events and other school activities, during the remainder of the day;
2. The fixtures and equipment used by the caterer are owned and maintained by the school; and
3. The students purchasing the meals cannot distinguish the caterer from the employees of the school.

**(k) Employees’ Meals.**

(1) In General. Any employer or employee organization that is in the business of selling meals, e.g., a restaurant, hotel, club, or association, must include its receipts from the sales of meals to employees, along with its receipts from sales to other purchasers of meals, in the amount upon which it computes its sales tax liability. An employer or an employee organization selling meals only to employees becomes a retailer of meals and liable for sales

tax upon its receipts from sales of meals if it sells meals to an average number of five or more employees during the calendar quarter.

(2) **Specific Charge.** The tax applies only if a specific charge is made to employees for the meals. Tax does not apply to cash paid an employee in lieu of meals. A specific charge is made for meals if:

(A) Employee pays cash for meals consumed.

(B) Value of meals is deducted from employee's wages.

(C) Employee receives meals in lieu of cash to bring compensation up to legal minimum wage.

(D) Employee has the option to receive cash for meals not consumed.

(3) **No Specific Charge.** If an employer makes no specific charge for meals consumed by employees, the employer is the consumer of the food products and the non-food products, which are furnished to the employees as a part of the meals.

In the absence of any of the conditions under (k) (2) a specific charge is not made if:

(A) A value is assigned to meals as a means of reporting the fair market value of employees' meals pursuant to state and federal laws or regulations or union contracts.

(B) Employees who do not consume available meals have no recourse on their employer for additional cash wages.

(C) Meals are generally available to employees, but the duties of certain employees exclude them from receiving the meals and are paid cash in lieu thereof.

(4) **Meals Credited Toward Minimum Wage.** If an employee receives meals in lieu of cash to bring his or her compensation up to the legal minimum wage, the amount by which the minimum wage exceeds the amount otherwise paid to the employee is includable in the employer's taxable gross receipts up to the value of the meals credited toward the minimum wage.

For example, if the minimum rate for an eight-hour day is \$46.00, and the employee received \$43.90 in cash, and a lunch is received which is credited toward the minimum wage in the maximum allowable amount of \$2.10, the employer has received gross receipts in the amount of \$2.10 for the lunch.

(5) **Tax Reimbursement.** If a separately stated amount for tax reimbursement is not added to the price of meals sold to employees for which a specific charge is made, the specific charge will be regarded as being a tax-included charge for the meals.

(l) Religious Organizations. Tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served by any religious organization at a social or other gathering conducted by it or under its auspices, if the purpose in furnishing or serving the meals and food products is to obtain revenue for the functions and activities of the organization and the revenue obtained from furnishing or serving the meals and food products is actually used in carrying on such functions and activities. For the purposes of this regulation, "religious organization" means any organization the property of which is exempt from taxation pursuant to subdivision (f) of section 3 of article XIII of the State Constitution.

(m) Institutions. Tax does not apply to the sale of, nor the storage, use, or other consumption in this state of, meals and food products for human consumption furnished or served to and consumed by patients or residents of an "institution" as defined in Regulation 1503. Tax, however, does apply to the sale of meals and food products by an institution to persons other than patients or residents of the institution.

(n) Meal Programs for Low-Income Elderly Persons. Tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served to low-income elderly persons at or below cost by a nonprofit organization or governmental agency under a program funded by this state or the United States for such purposes.

(o) Food Products, Nonalcoholic Beverages and Other Tangible Personal Property Transferred by Nonprofit Youth Organizations. See Regulation 1597 for application of tax on food products, nonalcoholic beverages and other tangible personal property transferred by nonprofit youth organizations.

(p) Nonprofit Parent-Teacher Associations. Nonprofit parent-teacher associations and equivalent organizations qualifying under Regulation 1597 are consumers and not retailers of tangible personal property, which they sell.

(q) Meals and Food Products Served to Condominium Residents. Tax does not apply to the sale of and the storage, use, or other consumption in this state of meals and food products for human consumption furnished to and consumed by persons 62 years of age or older residing in a condominium and who own equal shares in a common kitchen facility; provided, that the meals and food products are served to such persons on a regular basis.

This exemption is applicable only to sales of meals and food products for human consumption prepared and served at the common kitchen facility of the condominium. Tax applies to sales to persons less than 62 years of age.

(r) Veteran's Organization. Beginning April 1, 2004, tax does not apply to the sale of, and the storage, use or other consumption in this state of, meals and food products for human consumption furnished or served by any nonprofit veteran's organization at a social or other gathering conducted by it or under its auspices, if the purpose in furnishing or serving the meals and food products is to obtain revenue for the functions and activities of the organization and the

revenue obtained from furnishing or serving the meals and food products is actually used in carrying on those functions and activities.

(s) Food Stamp Coupons. Tax does not apply to tangible personal property which is eligible to be purchased with federal food stamp coupons acquired pursuant to the Food Stamp Act of 1977 and so purchased. When payment is made in the form of both food stamps and cash, the amount of the food stamp coupons must be applied first to tangible personal property normally subject to the tax, e.g., nonalcoholic carbonated beverages. Retailers are prohibited from adding any amount designated as sales tax, use tax, or sales tax reimbursement to sales of tangible personal property purchased with food stamp coupons. (See paragraph (c) of Regulation 1602.5 for special reporting provisions by grocers.)

(t) Honor System Snack Sales. An “honor system snack sale” means a system where customers take snacks from a box or tray and pay by depositing money in a container provided by the seller. Snacks sold through such a system may be subject to tax depending upon where the sale takes place. Sales of such snacks are taxable when sold at or near a lunchroom, break room, or other facility that provides tables and chairs, and it is contemplated that the food sold will normally be consumed at such facilities. Honor system snack sales do not include hotel room mini-bars or snack baskets.

(u) Mobile Food Vendors. Mobile food vendors include retailers who sell food and beverages for immediate consumption from motorized vehicles or un-motorized carts. Examples of mobile food vendors include food trucks, coffee carts, and hot dog carts. For sales made on or after July 1, 2014, unless a separate amount for tax reimbursement is added to the price, mobile food vendors’ sales of taxable items are presumed to be made on a tax-included basis.

This presumption does not apply when a mobile food vendor is making sales as a “caterer” as defined in (h)(1).

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1 The records acceptable in support of such a deduction are:

(a) A sales ticket prepared for each transaction claimed as being tax exempt showing:

- (1) Date of the sale,
- (2) The kind of merchandise sold,
- (3) The quantity of each kind of merchandise sold,
- (4) The price of each kind of merchandise sold,
- (5) The total price of merchandise sold,

(6) A statement to the effect that the merchandise purchased is not to be consumed on or near the location at which parking facilities are provided by the retailer, and

(b) A daily sales record kept in sufficient detail to permit verification by audit that all gross receipts from sales have been accounted for and that all sales claimed as being tax exempt are included therein.



## Appendix A

### California Sales Tax Exemption Certificate Supporting Exemption Under Section 6359.1

The undersigned certifies that it is an air carrier engaged in interstate or foreign commerce and that the hot prepared food products purchased from \_\_\_\_\_ will be consumed by passengers on its flights.

The undersigned further certifies that it understands and agrees that if the property purchased under this certificate is used by the purchaser for any purpose other than that specified above, the purchaser shall be liable for sales tax as if it were a retailer making a retail sale of the property at the time of such use, and the sales price of the property to it shall be deemed the gross receipts from such sale.

Date Certificate Given \_\_\_\_\_

Purchasing Air Carrier \_\_\_\_\_

(company name)

Address \_\_\_\_\_

Signed By \_\_\_\_\_

(signature of authorized person)

\_\_\_\_\_

(print or type name)

Title \_\_\_\_\_

(owner, partner, purchasing agent, etc.)

Seller's Permit No. (if any) \_\_\_\_\_

Note: Authority cited: Section 7051, Revenue and Taxation Code. Reference: Sections 6006, 6012, 6359, 6359.1, 6359.45, 6361, 6363, 6363.5, 6363.6, 6363.8, 6370, 6373, 6374 and 6376.5, Revenue and Taxation Code. Food Products Generally, see Regulation 1602. Alcoholic Beverages, tax reimbursements when served with, see Regulation 1700. "Free" meals with purchased meals, see Regulation 1670. Meals served to patients and inmates of an institution, see Regulation 1503. Vending Machines, when considered selling meals, see Regulation 1574. Meals at summer camps, see Regulation 1506(e). Parent-Teacher associations as consumers, see Regulation 1597.

## Regulation History

**Type of Regulation:** Sales and Use Tax

Regulation: 1603

Title: 1603, *Taxable Sales of Food Products*

**Preparation:** Cary Huxsoll

**Legal Contact:** Cary Huxsoll

The proposed amendments to Regulation 1603, *Taxable Sales of Food Products*, provide that mobile food vendors' sales of items subject to tax, on or after July 1, 2014, are presumed to be made on a tax-included basis.

### History of Proposed Regulation:

March 25, 2014	Public Hearing
February 7, 2014	OAL publication date; 45-day public comment period begins; Interested Parties mailing
January 28, 2014	Notice to OAL
November 19, 2013	Business Tax Committee, Board Authorized Publication (Vote 5-0)

Sponsor: NA

Support: NA

Oppose: NA